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JAMES H. McKENNEY,
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No. 49.

Brief of Wilson for Appt. Beall

Filed Nov. 3, 1898.

IN THE

Supreme Court of the District of Columbia.

THE UNITED STATES

v.

MARTIN F. MORRIS.

49

Brief on Behalf of Richard J. Beall, one of the Defendants in the above-entitled Case.

STATEMENT OF FACTS.

1. The defendant, Richard J. Beall, is the owner of lot 2, square 129. The fact that he is such owner is found by the court below, and he was allowed as the value of the ground so owned by him at the rate of ten cents per square foot.

2. That he was the owner of lands in that square is not now the subject of dispute as between him and the United States.

3. The extent of that ownership, to wit, as to whether it extended back to the river, is in dispute.

4. The value of the land is in dispute, the court below having allowed ten cents per square foot as its value,

whereas the defendant claims that it was largely in excess of that; that it is worth from one to two and a half dollars per square foot.

5. The record shows that the Government of the United States, in March, 1882, took possession of this land and caused the houses to be removed therefrom, since which time Mr. Beall has received no rentals therefrom or from any part thereof.

So that there are three questions to be considered in determining this case so far as he is concerned:

(1) Whether his ownership extended to the river.

(2) What was the value of the land owned by him, whether it went to the river or not; and

(3) As to the liability of the Government to compensate him for the rental value of which he has been deprived since 1882, as above stated.

BRIEF.

(1) As to that portion of this branch of the case that relates to the ownership to the river, that having been elaborately discussed in the briefs of the counsel in other branches of the case and in the general discussion, it would not be useful to trouble the court here with any repetition of that discussion, and so far as that question is concerned, reliance is had upon the briefs of counsel already filed in the other interests with which his is substantially identical.

(2) So far as the question of the value of the land is concerned, the evidence has been reviewed in the brief submitted by Mr. Lambert, and the court will not now be troubled with any further discussion of that subject, other than to call the attention of the court to the fact that the witnesses called on behalf of Mr. Beall fix the rate at from

two to two and a half dollars per square foot (Rec., pp. 2599, 2606, 2610, 2616, 2622), while the witnesses called on behalf of the Government fix the rate at from about two to ten cents per square foot. An examination of the evidence of the Government's witnesses will show that their knowledge is exceedingly meagre, and their statements entitled to little if any consideration. (See Record, pages 2656, 2658, 2664, 2671, 2685, 2690, 2692, 2695, 2698, 2699).

(3) The third question involved, as above stated, is the one to which the attention of the court is more especially now invited. It is submitted that the jurisdictional act is so broad in its terms that the court was authorized not only to ascertain the ownership of the lands, but also to determine any "claim arising in the premises" (Sec. 3) and (Sec. 4) in a "summary way to ascertain the value of any right, title, interest or *claim*."

It is submitted that since it appears by the evidence in this case, that the United States arbitrarily took possession of Mr. Beall's property in 1882 or 3 (Rec., pp. 2702, 2705, 2707) from which he was deriving an income of $32.50 a month, and of which he has been deprived since his eviction by the United States, the rental value of the property to which he is entitled, whatever that may be, is a claim which should be adjusted in this proceeding. The court below made no allowance on this account to Mr. Beall, but only allowed him for the value of the land as found by the court. This element of the claim was entirely ignored, and it is respectfully submitted that to whatever value shall be found on account of the land itself should be added the fair rental value from the time the United State took possession of it up to this date.

J. M. WILSON,
Of Counsel for R. J. Beall.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 49.

UNITED STATES

vs.

MARTIN F. MORRIS ET AL.

Brief on Behalf of Wilhelmine M. Easby-Smith, one of the Heirs-at-Law and the Administratrix d. b. n. c. t. a. of William Easby, Deceased.

This appellant and claimant is one of the beneficiaries named in the will of her father, the late William Easby. (Rec., Vol. 3, p. 359.) The estate is otherwise represented by the appellants, Rose L. and Fannie B. Easby, heirs-at-law of John W. Easby, deceased, who, at the time of his death, was the sole surviving executor of the will of the late William Easby, deceased.

The opinion of the Supreme Court of the District of Columbia filed March 4, 1896, ascertains the title to Lots 2, 3, 4, 5, 6, 7, 8 and 9 in Square 63, and to Lots 3, 4, 5, 6 and 7 in Square 89, and to Lot 1, Square 129, to be in the heirs of William Easby as tenants in common in fee simple. (Rec., Vol. 7, p. 2712). The values of these several lots as ascertained by the court, is to be found at page 2713 of Volume 7 of the Record. From the decree which was thereupon passed and is to be found at page 2714 of Volume 7 an

appeal was duly taken to this court by the heirs and estate of William Easby on the 16th day of April 1896 (Rec., Vol. 7, p. 2716), and perfected on the 24th of April, 1896. Rec., Vol. 7, p. 2717.

Excepting to the valuation of ten cents per square foot placed by the Supreme Court of the District of Columbia upon the foregoing lots belonging to the said estate, this appellant, on behalf of herself and of her co-heirs, respectfully submits for the consideration of the court the following points and authorities:

Mr. Lewis, in his work on Eminent Domain, lays down the general rule as to value thus:

> "In estimating the value of property taken for public use it is the *market* value of the property which is to be considered."

Then follows the well known definition of "Market value":

> "The market value of property is the price which it will bring when it is offered for sale by one who desires, but is not obliged to sell it, and is bought by one who is under no necessity of having it. In estimating its value all the capabilities of the property and all the uses to which it is adapted, are to be considered, and not merely the condition it is in at the time and the use to which it is then applied by the owner . . . All the facts as to the condition of the property and its surroundings, its improvements and capabilities, may be shown and considered in estimating its value."
>
> Lewis Em. Do., Sec. 478.

The property in question is peculiarly situated. It occupies part of the very contracted river front of the city.

See deposition of E. M. Willis, Rec., Vol. 7, p. 2615.

In the nature of things, its present condition affords no just criterion of its actual value considered with reference to the highly important uses to which it might be applied or

for which it is adapted. By the act of the Government in filling up the river bottom in front, these potential uses are destroyed—irretrievably destroyed. At the same time this very act of filling has made its acquisition of prime importance to the Government. The special value which thus attaches to it for governmental purposes is an element to be recognized and considered in estimating its present market value. For this we invoke with confidence the authority of this court.

In Boom Co. *vs.* Patterson the defendant owned the greater part of three islands in the Mississippi River above the Falls of St. Anthony, which were so situated with reference to the west shore of the river as to be admirably adapted for boom purposes. In a proceeding to condemn these islands by a boom company the jury found a general verdict for $9,358.33, and also found, specially, that the value of the land taken, aside from any consideration of its value for boom purposes, was worth the further sum of $9,058.33. This court sustained the general verdict, and in the course of their opinion say:

> "In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be, What is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted? that is to say, what is it worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. It capability of being made thus available gives it a market value which can be readily estimated.
>
> "So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is per-

haps impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rule; but as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may reasonably be expected in the immediate future.

"The position of the three islands in the Mississippi fitting them to form, in connection with the west bank of the river, a boom of immense dimensions, capable of holding in safety over twenty millions of feet of logs, added largely to the value of the lands. The boom company would greatly prefer them to more valuable agricultural lands, or to lands situated elsewhere on the river; as, by utilizing them in the manner proposed, they would save heavy expenditures of money in constructing a boom of equal capacity. Their adaptability for boom purposes was a circumstance, therefore, which the owner had a right to insist upon as an element in estimating the value of his land.

"So it is proper to show that property possesses a peculiar value for railroad purposes, for market gardening, for raising cranberries, for warehouse purposes, or for a bridge site. It is proper to show that the property is suitable for division into village lots and that it is valuable for that purpose."

A very just and eminently conservative estimate of the capabilities of these lots is furnished by the witness Willis in the course of his extended deposition at pages 2612–15 *et passim*. He assigns a minimum valuation of two dollars per square foot to the ground in the Squares 148 and 89.

In stating the ground of his opinion the witness referred, among other things, to the price paid by the Pennsylvania Railroad Company for the condemnation of certain squares on Maryland Avenue (in the immediate vicinity), between Thirteenth and Fourteenth streets, near the Long Bridge,

three or four years ago. This was from $3 to $3.50 per square foot.

It is proper to observe here that it has been the understanding with counsel representing the Government and the appellants, respectively, that the testimony of each witness, by whomsoever of the defendants called, shall inure to the benefit of all defendants alike.

The propriety of this arrangement is manifest when it is considered that the several squares which afford the subjects of this inquiry are similarly situated—that they form the almost united segment of a trio of squares and, in the nature of things, must be of nearly uniform value.

The witness, Hays, estimates the value of land in Square 129 at two dollars per square foot, and gives reason for the faith within him. He extends this valuation to the other squares above named. Rec., Vol. 7, p. 2599.

Considering Squares 89 and 148 with reference to their manifest availability, the witness, Frederick W. Pratt, well-known in this community for his intimate acquaintance with real estate values, estimates their worth at from $1.75 to $2 per square foot (p. 2617). He values Square 63 and 89, in view of existing conditions, at $1.50 per square foot (p. 2618).

Austin P. Brown thinks the property in Square 129 is worth from $1 to $1.50 per square foot at this time (p. 2622). Has no independent recollection of the location of Square 89 but from its reputed location thinks it worth something less than 129.

The filling of the lots in the several squares seems to have been done partly by private individuals and partly by the Government's agents. By whomsoever it was done it was manifestly equally beneficial to the party who did the filling as to the owner who permitted it to be done. The former was benefited by the use of a convenient receptacle for the deposit of refuse materials, within easy range and without cost. The latter, of course, derived an advantage

in the greater resulting elevation to the surface of his ground. The benefits, however, were mutual and equivalent. This is abundantly exhibited by the testimony of the complainant's witnesses, Henry Brewer (p. 2634) and John B. Duncklee (p. 2641).

The testimony of the witness Brainard H. Warner (for complainant) at page 2650, is too vague and indeterminate to merit consideration. It is based upon the merest superficial acquaintance with the locality and is totally lacking in the essential predicates for establishing value.

The testimony of Richard T. Morsell (for complainant) (p. 2658) is that of a highly reputable member of this bar, whose avocation can scarcely be said to fit him for the expert valuation of real estate. It is true that he forms his opinions upon divers sales of interior properties. These sales, however, were exceptional in character and were made in respect of ground which occupies an essentially different position in respect of municipal needs and development from the riparian lots we are now considering.

Of complainant's witness Wineberger (p. 2664) it would be an unnecessary consumption of time to speak. His evidence is utterly inconclusive. The witness, George E. Emmons, (complainant's) (p. 2671) testifies with great show of that peculiar technical knowledge which is much affected by the "advanced" dealer in real estate. His deposition may be said to have been made *secundem artem*. When analyzed, however, it will be found to be impressive mainly by reason of its glittering generalities. He is too positive in discussing hypotheses and too hypothetical in discussing facts to warrant confidence in his estimation of values. He may safely be left to the keen analysis of the court. The testimony of Lorin M. Saunders (p. 2685) admits of no more serious comment. The motion to strike his deposition from the Record should, it is submitted, be allowed.

The same course should be pursued in respect of the deposition of Leo Simmons (p. 2692).

George J. Johnson (p. 2698) confessed his incompetency to testify as to values.

Albert A. Wilson (p. 2695) was avowedly inconclusive.

Calvin W. Witmer (p. 2699), like Johnson, admitted his inability to testify on the subject of values.

In conclusion, I beg leave to observe, that the only definite and legally competent evidence adduced upon the subject of values in the court below, was submitted on behalf of the appellants, and that the average valuation thereby established for the several lots under investigation is $1.50 per square foot, and this, it is respectfully submitted, should be the finding of the court.

Respectfully,

TALLMADGE A. LAMBERT,
For Wilhelmina M. Easby-Smith, Appellant.

No. 49.

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Reply Brf. of Carlisle & Johnson for Appts.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1898.

Filed Nov. 19, 1898.

No. 49.

MARTIN F. MORRIS ET AL.

vs.

THE UNITED STATES.

REPLY

FOR APPELLANTS WILLIS, AMERICAN ICE COMPANY, THOMAS W. RILEY, BARBOUR ESTATE, GREAT FALLS ICE COMPANY, VAN RISWICK ESTATE, JOHNSON ESTATE AND KIMMELL HEIRS, CLAIMING UNDER NOTLEY YOUNG, BETWEEN THE LONG BRIDGE AND THE ARSENAL.

TO THE

Supplemental Brief of the United States.

CALDERON CARLISLE,
WILLIAM G. JOHNSON,
For Appellants Aforesaid.

LAW REPORTER PRINT 8298

IN THE

Supreme Court of the United States

OCTOBER TERM, 1898.

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FOR APPELLANTS WILLIS, AMERICAN ICE COMPANY, THOMAS W. RILEY, BARBOUR ESTATE, GREAT FALLS ICE COMPANY, VAN RISWICK ESTATE, JOHNSON ESTATE AND KIMMELL HEIRS, CLAIMING UNDER NOTLEY YOUNG, BETWEEN THE LONG BRIDGE AND THE ARSENAL.

TO THE

Supplemental Brief of the United States.

The undersigned feel it their duty to the court and to their clients to submit the following reply to the supplemental brief of the United States, filed under leave of the court on the 15th day of November, 1898, one week from the closing of the oral argument.

The necessity of a reply is accentuated by the fact that while the contentions and citations from the record by the United States in their main brief, in the oral argument and

in the supplemental brief, do not directly meet the contentions and citations of these appellants, they do tend to confuse the matter and to lead away the mind of the court from the controlling questions in the cause.

The supplemental brief of the United States is addressed wholly to the claims of wharf owners between the Long Bridge and the Arsenal.

The undersigned consider that they can best perform their final duty to the court in this cause by endeavoring—

First. To restate briefly and in general terms their own contentions and the outline of the arguments which support them.

Second. To notice such statements and citations in the supplemental brief as need answer and correction, and

Third. To add with convenient headings a somewhat more elaborate discussion of certain salient points to which the court may turn, as its interest in such points dictates, and to which the undersigned can appeal as showing that the general statements in the outline of contentions and argument find ample support in fact and in law in the record.

I.

THE CONTENTIONS OF THESE APPELLANTS.

Introductory.

These appellants claim all their rights under the deed in trust from Notley Young and the solemn acts of Presidents Washington and Adams, calling for the conveyance of all public property as laid out and delineated in the Dermott Map referred to and made part of said acts.

The United States has no other source of title in the city of Washington within the lands of Notley Young.

Under the scheme of the deed in trust the grand division of the city was into public and private property. The public

property was to consist of nothing except such streets, lots and parcels, as the President of the United States for the time being should select. *All else was to be private property*, whether retained by the original proprietors or sold to private purchasers by the Commissioners.

In all the discussions of what were and what were not "water lots" which appear in the record from the time of the Engraved Plan (1792) until the Dermott Plan (1797), there will be found no suggestion that riparian rights and water privileges were to belong to the Government, but the whole question was as to which squares and lots amongst *private* property had such privileges.

In all the discussion of a *proposed* Water street, both before and after the final approval of the Dermott Plan, the court will fail to find the faintest pretense on the part of any public authority that this street—this way—this public convenience—was ever supposed or intended to interrupt private riparian rights, or to absorb for the public all the commercial advantages of the city water front, which were relatively far more important in those days than now.

Certain controlling matters ought to be briefly recapitulated in order to make plain the true construction of the deed in trust, the true office of the plats, and other details connected with the division of the building lots, and the true office and effect of the map finally approved by the President as a proclamation of the boundary lines between public and private property, and as a final settlement of the rights of the United States, on the one hand, and the private citizens—grantors in the deeds in trust—and purchasers from the Commissioners, on the other hand.

The Trust Deed.

In considering the terms of the trust deed it must be remembered that we are here to-day in a court of equity, and we must give full value to all the equitable rights of the original proprietor, which were reserved by that deed.

It has been said in the brief of the United States, and repeated in the oral argument, that by the trust deed Notley Young parted with all his title to the land he convyeed. But this is clearly incorrect. He parted with only the legal title, and carefully stated a trust, of which he himself was one of the chief beneficiaries. This deed absolutely required the definite selection by the President of the streets and the other public appropriations in order to finally separate public from private property.

The trust deed reserved important rights to the grantors in addition to the right to the fair and equal division of the building lots. *First*, a right of possession of all the granted land till public appropriation or the sales of the Public's share of building lots should require possession to be surrendered. *Second*, a right to retain his buildings, garden and graveyard. And *third*, a right to have back "the land, if any," which was not laid out in the city. It is seen at once, therefore, that the division of the building lots could not, in any view, finally fix all the private rights of the grantor, but that those rights too were to be fixed by the work of definitely selecting the streets and other public appropriations, which work could alone, as to the private grantor and as to the United States—the two *cestuis que trust* —fix the plan of that Federal City, which was the subject-matter of the trust.

The Plats.

The plats were important to both Commissioners and proprietors in their divisions of building lots, but their importance lay in the square feet contained *within the boundary lines*—not in anything *outside those boundary lines or in any names given to those boundary lines.* The proprietors and Commissioners had the right to divide building lots—but they had no right to select or fix streets or other public appropriations.

Is it not, therefore, perfectly plain that the division of the building lots, which division took place under the authority of the deed in trust, by the very persons designated, the Commissioners and the proprietors, was but an incident in the execution of the trust, was but a part, which was in no sense to control either all the public right or all the private right of the two *cestuis que trusts?*

If as between a plan which showed the final selection of the public appropriations by the President, and any prior plan or the plats of squares or divisions made by the Commissioners and the proprietors, either had to yield, it was the prior plan, the plats and divisions, which had to yield. And as a matter of fact there is a demonstration in the record that the prior plans did yield to the final plan, so that Square 301, which appears on the Ellicott Plan, had to be wholly omitted when the surveys were actually made because there was no land of Notley Young on which to lay it out, but only the waters of the Potomac River; and on the Dermott Map no Square 301 appears, as was pointed out by counsel for United States in the argument. Every other square on the water front of which we have returns in the Registry of Squares corresponded with the final plan, and differed absolutely from the preparatory plan of Ellicott, which was never approved and adopted for the purpose of fixing the boundary between public and private rights, and which could not be used as engraved even for private property, because it could not be applied to the ground, and though the plats called for a water street in accordance with the *design* of the Ellicott Map, there was no land of Notley Young on which to lay it out.

The Map.

Hence the controlling importance of investigating and deciding absolutely as to *what was, for the purpose of fixing title, the final,* and therefore, *for the purpose* of the execution

of the *deed in trust* and the fixing of private right and public right under that deed, *the only map.* If there were only one map all would be clear. That there *was only one* for the purpose of fixing title is a matter of absolute demonstration.

There is not a fact in the record which throws the faintest doubt on the authenticity and identity of the Dermott Map as the map which was attached to and made part of the writings of Presidents Washington and Adams; but the same attempt to confuse the matter of the maps which was made in the main brief and in oral argument of the United States is repeated in the supplemental brief, and it is therefore expedient to set out at length in an appendix to this reply the citations read to the court in the closing argument, which, though all furnished to the United States, are not noticed in the supplemental brief (see appendix.)

It will be seen by these extracts that the Commissioners regarded the writings of Presidents Washington and Adams and the map to which they were attached as the "*authentic documents of the title of the public to the lands appropriated*"—"*the evidence of public property in the city.*"

It will be seen that the very Commissioners who wrote the letters (cited in the main and supplemental brief of the United States), in which are contained the general expressions of their desire, purpose and custom to follow the Engraved Plan *as far as practicable*, within a very few years afterwards, explained to the Congress of the United States, that it was *not practicable* to follow the Ellicott Plan near the water, that a change was required by the "*imperious necessity*" of physical conditions, *a deficiency of land* to the amount of about six hundred feet and there was *no land of Notley Young on* which to lay out the squares near the river of the shape and size indicated on the Ellicott Plan, and *no land on which to lay out any street between the squares and the Potomac River.*

The Instruments Annexed to the Dermott Map.

The fixing of the boundaries of the Federal District, and the fixing of the boundaries of public property in the city of Washington each required preliminary and experimental steps which yielded to and were superseded by the final solemn and definite proclamations of the President.

When General Washington was authorized by acts of Congress to fix the boundaries of the Federal District he did so in two proclamations under the great seal of the United States, attested by the Secretary of State—one directing *lines of experiment* dated January 24, 1791, and a second dated March 30, 1791, fixing the final boundary lines between the territory and jurisdiction of the Federal and State Governments.

When General Washington was authorized by the deeds in trust of the original proprietors to fix the boundaries of the property of the United States in the Federal City—as preliminary steps he caused to be prepared the designs or plans of L'Enfant and Ellicott—much as he directed the running of preliminary lines of experiment for the boundary of the Federal District, but when he came to fix the final boundary of the property of the United States in the Federal City, and to ask its conveyance under the terms of the deed of trust, he did so in a final, solemn and definite instrument.

His writing of March 2, 1797, addressed to the trustees and asking for the conveyance of the streets and reservations as laid out and delineated on the Dermott Map was a solemn proclamation of the boundaries of the property of the United States in the Federal City executed with the same formalities as the proclamation of the boundaries of the Federal District.

It was the official act of the President of the United

States, under the great seal of the United States, and attested by the Secretary of State of the United States.

President Adams acted with similar formality and solemnity, and these two writings refer to and were annexed to the Dermott Map.

The United States Acquired all its Title through the Dermott Map and the Instruments annexed, and thereby Acquired no Title to Water Street in Notley Young's Land.

By this map and General Washington's proclamation of public right addressed to the trustees, and confirmed by President Adams and by those instruments only, the United States got its title to all the ground in the city of Washington which it could acquire under the deeds in trust. And it can not be said that by any other map, or by any other transaction, the United States have become the owner in fee of a street, which is not on that map in front of the squares on Notley Young's land nearest to the river, and not otherwise described in the solemn instruments of its own title, when the court knows, from the history of this map finally approved by the solemn act of President Washington, that it correctly represents the true state of physical facts, and that there was actually no more land of Notley Young than appears on that map in front of the squares near the water.

The President of the United States for the time being got no authority to lay out any street in the Federal City except from the deeds in trust. So far as Notley Young was concerned, his deed in trust referred only to lands conveyed by him. The President could not lay out a street in the waters of the Potomac River without the express authority of Congress. That authority has never been superadded. Water street as it exists to-day was made by the private owners and occupants and by the operations of nature which added land to the face of the squares shown on the Dermott

Map, but not until long after the private right of wharfing had been exercised at many points. And when in the course of time Water street got any legal recognition as a street, it got it not under the deed in trust of the original proprietor, not from the Congress of the United States, but from the Common Council and Board of Aldermen of the City of Washington, and purely as a municipal improvement. And this recognition was accorded in 1839 in connection with a plan prepared by the surveyor of the city, who laid down the street for the first time, and to show its relation to water lots and private water privileges, placing the wharves in front of the private property. (See Elliott's Plan, No. 2, and Act of Councils, Vol. , p. .)

The Existing Water Street Created by Dedication.

This street was laid out on private ground, coming by accretion to the squares and irregular tongues of land, which had been occupied as private property for wharfing purposes by private owners, claiming under Notley Young, for forty years before the act of the council in 1839.

The Water street of today exists by common law dedication without any reference to the deed in trust, and is a public convenience conceded by the private owners and accepted by the municipal authorities with the approval of the President of the United States for the time being, coupled with a complete recognition of the private riparian right and right of wharfage.

By the terms of the deed in trust the property of the United States was confined absolutely to streets and lots and parcels, all to be selected by the President of the United States for the time being. The land conveyed, not laid out in the Federal City, in streets or reservations for the public, or building lots, was to revert to the original proprietor.

There is no theory or interpretation of the terms of the

deed in trust on which title to the irregular tongues of land left at intervals in front of some of the squares on the Potomac River as shown by the Dermott Map, and not "laid out and delineated as a street," could be secured to the United States, unless they had been described as public reservations and the President would have been obliged in his writing to the trustees to describe them by metes and bounds. This he did not do.

By the solemn proclamation of General Washington, confirmed by President Adams, both referring to the Dermott Map to which they were annexed, all public right within the lands of Notley Young, whether in the streets or reservations, was finally and definitely selected, everything, except those streets and reservations, was *private property.* The building lots to follow the fair and equal division, and to belong to the proprietors or to the purchasers at the sales by the Commissioners, and the land, if any, not laid off into streets, public reservations or building lots, remained to Notley Young as private property, and the title to it, whether by deed, descent, devise or adverse occupation, as against him and his heirs, is good in the appellants today.

II.

CERTAIN PROPOSITIONS AND CITATIONS OF THE SUPPLEMENTAL BRIEF CONSIDERED.

After citing on pages 2, 3 and 4 of the brief certain general expressions of Mr. Jefferson, the Commissioners, General Washington, and Attorney General Breckenridge, against any changes in the Ellicott Plan, it is stated on page 4 that these declarations of the President and of the Commissioners conclusively dispose of the pretension that the President in signing on March 2, 1797, the "instrument" calling upon the trustees to convey the appropria-

tions described, and also "the streets delineated on the annexed plan" intended any suppression of the "Engraved Plan" or the "Water Street" delineated upon it, or that the Commissioners understood the President's act to have any such effect.

These appellants have made no such pretension. The contention of these appellants distinctly is that the call for a conveyance of land for streets and reservations as laid out and delineated in the Dermott Map in legal effect gave to the United States whatever of streets and reservations were laid out and delineated in that plan, irrespective of whether the same had been laid out and delineated in any other plan of the city before or since.

Nor is it pretended that it was the design of the Dermott Map to suppress the Engraved Plan or Water Street, or anything else shown upon the Ellicott Plan. The purpose of the Dermott Map was to show the actual result of the surveys and to indicate on paper the actual situation of the land after such survey, and the change in the entire tier of squares in Notley Young's land along the river front, and the elimination of Water Street was not because of any design to affect the Ellicott or any other plan, but because, the land did not exist upon which that plan could be executed.

Certain it is that the Ellicott Plan gave no particular sanctity to Water Street which entitled it to be preserved more than any other street, or the squares or reservations throughout the city; and yet it stands as a confessed and incontrovertible fact that many of the reservations, as thereon indicated, were changed, and a large number of the squares were also changed to meet the actual conditions when applied to the land itself. Eighteen of the squares in Notley Young's land, thirteen of which went to him, and five of which went to the public as private property, were obliged to yield in their size and shape from the Ellicott dimensions to the "imperious necessity" and "obvi-

ous utility" arising from the lack of land upon which to plat them, and Sixth Street, a public thoroughfare of the city belonging to the United States, which on the Ellicott Plan extended to R Street, south, also had to yield to this physical condition and to terminate in front of Square 503, between N and O streets, as indicated upon the Dermott Map and the much-lauded King Map, and, as it stands today, open to the observation of any person who chooses to traverse it.

It is a most extraordinary inconsistency for the counsel of the Government to stand here, admitting that the private property had to yield, and that even Sixth Street, one hundred feet wide should, for three and a half squares of its length (a distance of nearly fifteen hundred feet) be eliminated by this physical condition, and yet Water Street must rise superior to the face of nature.

It is stated on pages 5 and 6 of the reply brief:

> "Nothing short of an Act of Congress, or at least the combined act of all parties in interest under the deeds in trust, and all the numerous persons who had acquired interests through purchases of lots from the Commissioners and from the original proprietors during the five years which elapsed between the promulgation of the Engraved Plan in 1792 and the appearance of the Dermott Plan in 1797, could have accomplished the suppression in that year of the subdivisions indicated on the Engraved Plan or destroyed the public right to the street along the river shown on that plan."

The plain meaning of this proposition is that the promulgation of the Engraved Plan in 1792 vested in the United States the right to the streets as thereon indicated.

We respectfully submit with all deference to the distinguished counsel of the United States that the proposition is simply preposterous.

It amounts to this, that the experimental drafting of a plan of the city in advance of surveys, rendered fixed and immut-

able the streets thereon indicated irrespective of whether or not the land to which it was to be applied would, upon actual survey, meet its requirements. And the absolute folly of the proposition is made apparent when it is remembered that the United States today insists upon the diminution of the squares in Young's land from the proportions assigned them in that plan, and exhibit no concern over the loss of some fifteen hundred feet of Sixth Street.

The position assumed by the counsel for the United States reaches the extravagant pitch of asserting that the promulgation of the Ellicott Plan passed to the United States the title to the streets as thereon indicated, although the squares formed by these streets had to yield to the conditions of nature.

On page 10 of the brief it is stated that on June 22, 1794, "the Commissioners rejected certain surveys in Mr. Young's land which gave the Potomac as one of their boundaries, and adopted the returns which gave the squares in his land a boundary on "Water Street according to the design of the *plan of the city.*"

The explanation of this is that whereas the surveyors returned the squares bounded *according to the fact* the Commissioners instructed them to change the returns to read *according to the theory or design* of the Ellicott Plan. Calling the boundary of a square Water Street could not make the Potomac River a part of Notley Young's land. The boundary continued to be the Potomac River notwithstanding the direction of the Commissioners.

It is also stated on the same page and in the next paragraph as follows:

> "Thomas Freeman, the surveyor of the city, on July 12, 1794, informs the Commissioners that 'Water Street on Potomac River is adjusted and bounded.' (Rec., Vol. 4, p. 1595)."

It must not be inferred from this passage that the remark of Mr. Freeman applies to Young's land. A reference to the page of the record cited will show that Mr. Freeman was speaking of work being done in the section of the city north of K street north and west of New Hampshire Avenue, and that the Water Street to which he refers is the street laid out and delineated in the Dermott Map along the river from 21st to 27th streets and laid out wholly in the water.

On page 11 it is stated a plat of the squares in which Mr. Young's improvements lay was returned by the surveyor (Rec., Vol. 6, between pages 398–9) with Water Street as their boundary.

This statement is very misleading. There is not a scintilla of evidence that the plat referred to was returned by the surveyor or that Mr. Young ever saw it or knew of its existence. The plat referred to is designated in the Index to Vol. 6 as "Exhibit U. S. No. 51, Map showing location of Notley Young's garden, improvements, etc."

Upon reference to the testimony, Volume 7, page 2137, it will be found the counsel of the United States made the following offer in evidence:

> "And also another map from the Congressional Library of part of the city of Washington, showing the location of the garden, improvements, etc., of the said Notley Young."

In the 2735 printed pages of this record the above quoted passage is the only evidence which in the remotest degree applies to this alleged plat.

There will be found in the same Volume 6 with that alleged plat, immediately after page 398, another plat entitled:

> "Map of part of the City of Washington showing the situation of the Mansion House Graveyard and buildings belonging to Mr. Notley Young, original proprietor of that part of the city,"

which shows no Water Street, but does show the line of the river.

This map was put in evidence by the defendants (Rec., Vol. 4, p. 1595). This plat is equally unauthenticated. It results, therefore, that the record in this case shows two unauthenticated plats, one of which has the words "Water Street" written in front of the squares and the shore line not shown; the other has the line of the river plainly shown in blue and has no mention of Water Street.

Reference is also made in the supplemental brief of counsel for the United States to the plats in Notley Young's squares returned by the surveyor, bounded by a water street, and signed by him.

All the plats of these squares between the Long Bridge and the Arsenal, with the exception of Squares south of 415 and west of 471 will be found in Volume 7 from pages 2140 to 2154. Square south of Square 415 will be found in Volume 3, page 1030, and west of 471 in Volume 3, page 1043.

Upon examining these, the court will see that Notley Young did not sign the returns of surveyors or the plats, nor did he in all instances sign any part of the paper. What he did sign was a certificate as to the allotment of the squares between himself and the public from three to four years after the returns were made.

On pages 2138 and 2139 will be found the returns of six of these same squares as first returned in June, 1793, in which the boundary is given as Potomac River, and the return signed Andrew Ellicott, the author of the Ellicott Plan. It was in December, 1793, that the Commissioners directed the change in these returns so as to read Water Street instead of Potomac River.

Thus the court will see that even the author of the Ellicott Plan when he came to make returns of the actual surveys, in less than a year after the publication of his plan,

returned them as bounded by the Potomac River; and in the changed returns of December, 1793, with the accompanying plats as shown in Volume 7, pages 2140 to 2154, in some instances by him, in some by his brothers, and in others by Freeman and Fenwick acting under him, the plats all conform in shape and size with the Dermott Map and not with his own map.

But it is wholly immaterial whether Notley Young signed the plats or whether or not he approved a water street at the point indicated. His approval was unnecessary if a street was in fact reserved and approved by the President. But neither his approval nor the acts of the Commissioners nor of the surveyors, nor even of the President, could convert water into land or pass title under the trust deed to the United States to what had no existence in point of fact.

It is conceded that square southeast of Square 267, Squares 270, 356, 390, and 391, had their river fronts submerged under the waters of the Potomac River. Certainly as to these squares there was no power under the deed in trust or in any officer of the United States to create in front of them a street. The land under the waters did not pass by Young's deed, and many pages of the main brief of the United States, in dealing with the Marshall and Kidwell claims, are devoted to showing that under the law the land under the water was not the subject of control by anybody but the Congress of the United States, and that not unrestricted.

It is therefore impossible in any view of the matter that, under the deed in trust from Notley Young, the fee in land under the water in front of these squares could have passed to the United States. But the faces of squares themselves, whatever may have been their nominal boundaries, were actually under the water, and as such were undoubtedly riparian property.

It is said on page 13 of the brief that—

> "under the instrument signed by President Washington on March 2, 1797, the trustees are not called upon to convey the appropriations shown on the annexed plan, but only the streets delineated thereon. The instrument substantially describes the appropriations which are to be conveyed; they are not determined by the plan but by the description."

If this statement be correct it would only serve to emphasize the position of these appellants, namely, that the descriptions of street was exclusively as laid out and delineated in the annexed plan. But apart from that consideration the counsel for the United States is entirely and utterly mistaken in the statement. Upon examining the instrument signed by President Washington (Rec., Vol. 6, pp. 152 to 156), it will be found that while the various appropriations are described by designated boundaries, the boundaries given are streets and squares of the city, and the conclusion of the descriptions is "*as the same are also laid out and delineated on the said plan.*"

In March, 1797, when President Washington, at the instance of the Commissioners, executed in the very formal manner the instrument requiring the conveyance to the United States of all the land to which under the trust deed it was authorized to acquire title, he is not presumed to have been ignorant of the fact that the execution of the Ellicott Plan, according to its exact design, had proved upon actual survey to be a practicable impossibility, and that when they reached the river there remained not the land requisite to lay out the elaborate street indicated upon that plan, nor even sufficient for the squares to the east of that projected street.

On the contrary, he is presumed to have understood what was obviously the fact, that the Ellicott Plan had been in all substantial respects followed and that the city had been laid out as far as practicable thereunder,

but that where a deficiency of the land rendered the execution of any part of the plan impossible, that particular feature must of necessity be abandoned. Had the purpose been otherwise, the squares indicated on Ellicott's Plan, instead of being reduced from the proportions and shapes there given to those which they occupy on the Dermott Map and in the city to-day, and many of them in part submerged under the waters, could have been yet further reduced, or, if necessary, in whole obliterated, in order that this street upon the river shore might be laid out in Notley Young's land, in accordance with the Ellicott design, because the power of the President in this respect was supreme.

On the contrary, however, it appears that when the practical situation was met, the necessities of the case called for definite and decisive action. This was accomplished by carrying out the squares as far as the land would permit and abandoning Mr. Ellicott's elaborate project on the river front.

Much attention is given by counsel for the United States to the frequent references by the Commissioners to Water Street. But all of these will be found to contemplate a municipal improvement and one of a peculiar character, namely, not the improvement of land derived from Notley Young by the United States under his trust deed, but a reclamation from the waters of the Potomac to carry out the project of Ellicott, apparently designed to be laid out on the land.

On page 14 of the supplemental brief will be found a feeble suggestion that the Dermott Map shows Water Street in Notley Young's land.

Upon page 33 of the main brief of these appellants will be found the following statement with reference to the Dermott Map:

> "If such a street [Water Street] was so laid out and delineated in that plan, it is at once conceded by appellants that the President's approval of that plan

and directions to convey the streets as laid out and delineated was a valid creation of such street in law, binding upon Notley Young and all the world."

In view of this concession of these appellants made and brought to the attention of the counsel for the United States before the main brief of the Government was prepared, and admitted by them in the oral argument, it would seem that had counsel for the Government any confidence that a Water Street was laid out and delineated on the Dermott Map in Notley Young's land between the squares and the river, they would have attempted to establish that fact to the satisfaction of the court. But on the contrary some forty or fifty pages of the main brief and a supplemental brief of twenty pages are devoted to showing that the Dermott Map can not be treated as the source of title of the United States to streets; and in the oral argument in behalf of the United States no suggestion was made that the map indicated a street, nor was it attempted in any way to show that a street was there; but the entire effort was to eliminate from the President's request the Dermott Map with reference to streets and to set up as the title to Water Street the project of Ellicott.

III.

SALIENT POINTS IN THE CAUSE FURTHER ELUCIDATED.

Though the general contentions of appellants have been briefly stated, and specific points in the supplemental brief have been separately noticed, it is deemed proper to submit some observations upon certain matters, the importance of which has been heightened by the range and direction of the discussion in the oral argument and the supplemental brief.

The Subject-matter of the Deed in Trust was not the Making of a Geometric Plan of the City on Paper, but the Actual, Physical Division in Specie of the Land Itself.

By the trust deed the *land* was to be "laid out" "for a Federal City, with such streets, squares, parcels and lots as the President of the United States for the time being shall approve." (Vol. V, p. 47.)

This contemplated the physical laying out of the land itself; it was *land* that was conveyed and *land* that was to be divided.

No mere scheme of division or arrangement on paper without reference to the actual land to be divided could accomplish the purpose of the trust deed.

In the case of such a paper scheme of division, if there had been no *land* in existence to answer such scheme it must inevitably have been set aside as invalid and inoperative, because in a fair and equal division one party could not be given the physical *land* conveyed for division and the other required to accept mere geometric designs upon paper having only an imaginary existence.

Ordinarily it would not be necessary to argue so obvious a proposition as the above, but it becomes pertinent to do so here because, as will be shown later on, the contention of the counsel for the United States leads to the absurdity of claiming as the lawful plan of the city, controlling the division and title to land, a plan made before the return of a single survey and for the complete fulfillment of which there was *no land in existence then or now.*

The importance of this matter is that no map or plan for the identification of land to be conveyed could be of any validity or value except one which correctly represented the boundaries of actually existing and divided land.

There was not in Physical Existence on March 2, 1797, nor is there to-day Land in Notley Young's Tract sufficient to satisfy the requirements of the Ellicott Design on the Water Front.

The accuracy of the King Map of 1803 is insisted upon by counsel for the United States in both its briefs, and was insisted upon in the oral argument. A comparison of that map with the Dermott Map will show that the shore line in the two in Young's land and the position and shape of the squares exactly correspond, the only difference being that on the King Plan the words "Water Street" are written in the part representing the waters of the Potomac River.

On examining the Ellicott Map (Vol. V, immediately before page 77), it will be found that Sixth Street west is continued down to the south line of Square 506, the southernmost square on that map in Young's land, and that Squares 503, 504, 505 and 506 are all enclosed on their east and west lines by the parallels of Four-and-a-half and Sixth streets, respectively. When, upon actual survey, these squares came to be laid off on the ground, the bend of the river would not admit of their being laid out as indicated on the Ellicott Map nor of the continuation of Sixth Street below about the middle of Square 503, where it ran into the river. As a consequence of this, the corner of Square 503 is cut off, and from that point the parallel of Sixth Street stops and the river line controls the boundary on both the King and Dermott Maps alike.

To appreciate the extent of this difference between the Ellicott Map and the actual land, it is only necessary to refer to the evidence put in by the counsel for the United States.

The return of survey and plat of Square 503, will be found (Vol. VII, p. 2149), corresponding in shape with the Dermott Map.

The north boundary of that square as shown by the re

turns, including the entire distance from Four-and-a-half to Sixth streets, is there given as 563 feet 10 inches, and the south boundary as 481 feet 6 inches, a reduction of 82 feet 4 inches from the Ellicott design rendered necessary by the proximity of the river.

Nor is this all. Ellicott's design not only indicates the square as a complete rectangle, but continues Sixth Street (a street 100 feet wide), and interposes a rhomboidal square still further towards the river, immediately opposite Square 503, and beyond this square indicates a broad space before the river is reached.

The Ellicott Map being drawn to a scale of 100 poles to the inch (1,650 feet) it is easy to measure the distance, and it will be found that from the southwest corner of Square 503 to the river is two tenths of an inch or 330 feet. If to this be added the reduction from this square of 82 feet 4 inches, made necessary, as above shown, the plain result is found that in order to effectuate the Ellicott Map upon the ground would require 412 feet 4 inches more of land than actually existed. If the examination be continued down to the south line of Square 506 it will be found that Ellicott's Map continues that square to the full width of 563 feet 10 inches (the distance from Four-and-a-half to Sixth Street), and leaves a space between it and the water of 165 feet measured by his scale.

On turning to the return of the survey of Square 506, put in evidence by the counsel for the United States (Vol. VII, p. 2152), it will be found that the south line of Square 506 is only one hundred and fifty-five feet, a reduction of 408 feet 10 inches, rendered necessary by the close proximity of the river. If to this be added the imaginary space shown on the Ellicott Map of 165 feet, between the square and the river, the deficiency of land for the Ellicott Plan at that point is 573 feet 10 inches, or 10 feet more than the width of the whole block from Four-and-a-half to Sixth Street.

Thus it is matter of demonstration that when the surveys were actually completed there was not only no land left upon which to lay off a water street as indicated on the Ellicott Map, but even the square there indicated had to be much contracted in size and changed in shape, and one of them (Square 301) on the Ellicott Map wholly dropped, as it would have been located in the channel of the Potomac River in two fathoms of water. In the light of these circumstances it will be readily understood why the Commissioners, in their letter to Chairman Dennis of the Congressional committee, of March 23, 1802 (Vol. IV, pp. 1606–7), say of the Ellicott Map:

> "It has since been pursued in all the operations in the city under the directions of the Commissioners AS FAR AS PRACTICABLE, but, the city *not having been surveyed*, and this plan being made *partly from L'Enfant's draught* and partly from materials possessed by Mr. Ellicott, it was probable that it would *not correspond with an actual mensuration.*"

And Mr. Dennis, in his report to Congress (Vol. VI, 295–6), says of Ellicott's Plan:

> "It was, however, found, *on actual survey*, that the Engraved Plan was in many respects *inaccurate*, and that *the actual situation of many streets and squares differed so essentially from the situation which they seemed to possess on the face of that plan that, though they appeared, on paper, to be some distance from the water, they were found to be situated in the Potomac.*"

This condition necessarily led to some very radical departures from the Ellicott Plan when it came to the actual carrying out on the ground the project of that design.

The Ellicott Plan was Impracticable in other portions of the City as well as on the Water Front, necessitating other Important Variations in Execution.

There have already been placed before this court dia-

grams showing that, of the eighteen squares on the river front in Young's land, five are wholly omitted and the thirteen remaining ones are incorrect in their boundaries. This glaring inaccuracy can be found throughout the map. In the northwest section alone, irrespective of the large number of omitted squares, there are *eighty-five* squares (nearly twenty per cent. of the whole,) which do not have their proper shape *owing to the incorrect delineation of the streets* constituting their boundaries, each and every one of which is correctly delineated on the Dermott Map and corresponds with the returns of surveys. A comparative diagram of these eighty-five squares would show as glaring inaccuracies as in the thirteen river squares in Notley Young's land, and but for the time and expense required to produce them would be filed with this brief.

A comparison of the squares on the Ellicott Map with the returns and with the Dermott and King Maps will demonstrate the accuracy of this assertion, and their numbers are here given, to wit:

Squares 1, 2, 3, 4, 9, 11, 12, 18, 19, 20, 22, 29, 30, 31, 43, 44, 47, 48, 49, 51, 62, 63, 65, 66, 73, 74, 84, 88, 89, 90, 93, 99, 101, 109, 110, 111, 112, 124, 128, 131, 139, 141, 150, 151, 153, 154, 159, 161, 171, 181, 182, 195, 196, 202, 203, 254, 276, 309, 316, 330, 360, 393, 396, 419, 441, 444, 482, 490, 507, 510, 511, 514, 515, 519, 521, 522, 523, 528, 533, 551, 554, 556, 574, 614, 624.

To each and every one of the above designated squares the Ellicott Map gives false boundaries, and as the boundaries are created wholly by streets the errors demonstrate the utter unreliability of the map. Thus, in the case of Square 110, correctly bounded by 19th, 20th, R and S streets, and constituting a right angled quadrangle, the Ellicott Map makes a pentagon bounded by 19th, *Connecticut Avenue*, 20th, R and S streets, thus introducing a *fifth street* and a *fifth side* in the boundaries of a square which had and now

has but four sides in fact, and is not touched by Connecticut Avenue.

None of these facts can be denied by counsel for the United States, and in the face of them it is matter of amazement that they should insist upon the establishment of this mischievous chart with its false and misleading boundaries, drawn at a time when the true facts furnished by surveys were inaccessible, as one to control the actual division of land and the vesting of title therein.

The Ellicott Plan only a Working Design by which to lay out the City as far as Practicable, and the Dermott Map the Identification Map of the Actual Results for Division of and Title to Land.

In the supplemental brief of counsel for the United States much space is devoted to showing that the Ellicott Plan was the design of the city which was followed in the actual laying out of the city, and that deviations from that design were not allowed where they could be avoided, but, in the language of Washington, were only admitted in "cases of necessity or from obvious utility" (Vol. VII, p. 2238), or "unless imperious necessity should require it, or some great public good be promoted thereby." (Vol. VI, p. 339.)

It is quite true that the Ellicott *Plan* as a *design* to work by was followed in good faith "as far as practicable," by all concerned, but "imperious necessity" and "obvious utility" made many departures absolutely unavoidable.

As already shown, it was merely a *plan* of a city, *to be laid out in the future*, none of the surveys for which had, at that time, been made, and we entirely agree with the counsel for the United States in the statement, on page 18 of the supplemental brief, that—

> "THE ENGRAVED PLAN CONSTITUTES A REPRESENTATION OF SOMETHING TO BE DONE ACCORDING TO A CERTAIN SCHEME AND DESIGN INDICATED UPON ITS FACE."

We gladly accept this statement as the just and true characterization of Ellicott's Plan.

It is also freely admitted as quoted in said brief (p. 5), that it was "*pursued in all the operations in the city, under the direction of the Commissioners,* AS FAR AS IT WAS PRACTICABLE."

It was not "practicable" to lay out the squares and the Water Street, or the space between them and the river in Notley Young's land as indicated in that design because, as we have shown, Notley Young's land lacked nearly six hundred feet of the width necessary to satisfy, in actual execution, that part of Ellicott's design.

We also admit the accuracy of the statement in said brief (p. 18) "that the Dermott Plan is a MAP which illustrates its accomplishment in part." This is exactly the position taken by these appellants, and their whole contention stands thus broadly admitted in this supplemental brief for the United States; namely:

> "The Engraved Plan constitutes *something to be done.*"
>
> "The Dermott Plan is a *map* which illustrates its *accomplishment* in part;" that is, "AS FAR AS IT WAS PRACTICABLE."

We have already shown that it was not only not "practicable," but was physically *impossible*, to execute the Ellicott design in full, because the land did not exist upon which to lay out the squares and streets as therein indicated, and the actual surveys rendered it impossible to lay out the squares with the street boundaries as indicated in the Ellicott Plan, but, on the contrary, required the change of the entire water front in Notley Young's land, and of the boundaries of nearly twenty per cent. of the squares in the northwestern section of the city alone. The Ellicott Plan being then merely the *project* of the city on *paper*, and the Dermott Map being the delineation of the actual city as it then

existed *in fact*, and the Ellicott Plan being in most essential particulars inaccurate because *impossible of execution*, there was not only strong reason for the Executive, when calling upon the trustees to convey the *actual land* which had been in fact laid off into streets and reservations to embody the Dermott Map in that request, but it was matter of "*imperious necessity.*"

No request was ever made to the trustees to convey for the use of the United States the land to which it was entitled except that by President Washington of March 2, 1797, distinctly limited to the streets and reservations laid out and delineated on the Dermott Map, which request was repeated by President Adams in July, 1798. However useful the plans of L'Enfant and Ellicott might be in indicating the design to be pursued in the work of actually laying out on the land the city which was to be, they were not intended to affect, and could not possibly affect *title* to any land, because they could not by any possibility have been applied to the subject-matter, the land which was to constitute the city, and which was the subject of the division prescribed by the deed in trust.

When, however, by actual survey the Ellicott Plan had been carried out, "as far as was practicable," and all the *land*, the physical subject-matter of the deeds of trust, had been, in fact, divided up into streets, squares, parcels, etc., as far as it would go, a map delineating, not an unexecuted and, in part, impossible *theory*, but the actual fact of such division, when annexed to the request to convey, became the controlling description by metes and bounds of the land to be conveyed and fixed beyond all question or controversy the dividing lines which separated public from private property.

To attempt now to disregard the map of the accomplished fact and to go back to the imperfect and, in part, impossible experimental design would be as unreasonable as to enter a house by the window instead of the door, in order to

conform with the preliminary studies of the architect not strictly carried out in the final execution of the work.

The King Map an Unofficial, Unauthorized and Unnecessary Document Without Legal Effect.

The King Map, to which reference is so frequently made by counsel for the United States, throughout the case and in the supplemental brief, is a wholly unofficial production never authorized or sanctioned by anyone in authority. At pages 51–53 of the main brief for these appellants is pointed out its utter lack of authority, and in the brief of Mr. Selden (pp. 274–78) its utter lack of authority is made a matter of demonstration by reference to this Record.

No President ever approved or authorized it; no act of Congress ever gave it lawful right of existence, while the office of Commissioners having been abolished June 1, 1802 (2 Stat. 175–6), they could not, of course, have approved a map made, as this purports to have been, in 1803.

Though counsel for the United States insist in both their briefs upon some legal effect being given to this map they do not pretend to show that it has any legal authority.

It is to be remembered that Nicholas King, its author, is the same person who endeavored without success to secure the abrogation of the Dermott Map by Presidents Adams and Jefferson, because Dermott's Map *omitted Water street* and he sought to have another map made and promulgated in its stead.

Failing in that he appears to have used his talents as a draftsman to make this map and to have had the official impudence to put it in the surveyor's office as though it were a part of the public records. If its authority could in any way be established it is not conceiveable that the able, diligent and industrious counsel for the United States would

allow the challenge of its validity in the brief of Mr. Selden and of these appellants to go unanswered.

The fact is that it is absolutely without any legal authority and is no more entitled to consideration by this court than the rubbish known as the "Brown Sheets" introduced into this record under the ridiculous pretence of the hearsay testimony of the gardener who claimed to have received them in 1871 from General Babcock and to have kept them until about December, 1890 (Vol. IV, p. 1639.)

The Decisions of this Court in the Van Ness Case, 4 Peters, and the Steamboat Cases, 109 U. S.

The contention of appellants as already stated is that within the true intent and meaning of the deed in trust and giving proper effect to the plats with reference to the division of the building lots and to all intervening transactions, and giving its proper controlling effect to the map of the land as actually laid off approved by President Washington, and his request for conveyance of the streets with reference to this Map, no street, or strip of ground along the water in front of the squares in Notley Young's land, passed in fee to the United States.

If this contention is correct, then it is not necessary either to explain or distinguish the present case with reference to the opinion of Mr. Justice Story in the Van Ness Case, in 4th Peters, or the opinion of the majority of this court in the Steamboat Cases, 109 U. S.

But if we are wrong and a street did pass, we contend, nevertheless, that with the light of this record, which has gathered together in one publication of seven volumes, to which every different interest has contributed, all the information in the public records on the subject, most of it printed for the first time, in a cause which is authorized by a special act of Congress, where the United States is complainant, and where the court is clothed with express power

to confirm *any claim of any character*, it would be reasonable and proper not only to see whether the strong equity which appealed with such force to Mr. Justice Miller, Chief Justice Waite and Mr. Justice Gray in the Steamboat Cases, does not find ten-fold support in this record, but also to carefully examine the two cases last mentioned in order to ascertain whether it is not absolutely necessary to modify some of the expressions in the opinion of the majority of the court in 109 U. S. as to the true meaning and effect of Mr. Justice Story's opinion in the 4th Peters, and as to the true construction of the deeds in trust and the acts done under them.

The True Meaning of Mr. Justice Story's Decision in the Van Ness Case as to the Streets.

The very public reservations in question in the Van Ness Case were described in the act of Congress there in question, and in the suit, by numbers 10, 11, and 12, taken from General Washington's writing annexed to the Dermott Map, that writing being the sole origin of this numerical designation. Reservation No. 12 had no existence on the Ellicott Plan. It had been added with the approval of the President and he had requested its conveyance with the other public property as laid out and delineated on the Dermott Map.

By the changes provided for in the act of Congress before the court in the Van Ness Case, no private property was involved or in any wise affected; and this court will see on inspection that a street was not otherwise involved in the Van Ness Case than by the altering of the front line of Reservation 10, so as to conform to the diagonal line of Pennsylvania Avenue like the adjoining Reservation 12.

All that this court decided in the Van Ness Case was that the fee in the streets passed to the United States not impressed with any special trust for the original proprietor or his heirs; but there is a clear implication in the language and reasoning of Mr. Justice Story that the streets were to be

maintained as streets—that there was a trust as to the inhabitants and property owners to maintain these streets, and that, though they might be altered and widened, this was still to be done in the proper exercise of municipal power and with proper respect and consideration for private property.

Let Mr. Justice Story speak for himself:

> "*For the streets they were to receive no compensation. Why? Because those streets were to be as much benefit to themselves as lotholders as to the public.* They were to receive twenty-five pounds per acre for the public reservations. . . . It can therefore be treated in no other manner than as a bargain between themselves and the Government for which each admitted an adequate consideration. Neither considered it a case where all was benefit on one side and all sacrifice on the other. It was in no just sense a case of charity and was never so charged in the negotiations of the parties. But, as has already been said, it is not in our view material whether it is to be considered as a donation or a purchase, for in each case *it was for the foundation of a City.*"
>
> "*And in construing this agreement this fact should never be lost sight of.* It is obvious that the proprietors or their heirs could not be presumed for any great length of time to have any interest in the streets or public reservations *beyond that of other inhabitants.* If the city became populous, the lots would be sold and built upon, and in the lapse of one or two generations, at most, the title of the original proprietors might well be presumed to be extinguished by sales or otherwise, so that the interest of themselves or their heirs in the streets and reservations *would not be distinguishable from that of other citizens.*"
>
> "*They must also have contemplated that a municipal corporation must soon be created to manage the concerns and police and public interests of the city, and that such a corporation* WOULD AND OUGHT TO POSSESS THE ORDINARY POWERS FOR MUNICIPAL PURPOSES WHICH ARE USUALLY CONFIDED TO SUCH CORPORATE BODIES. AMONG THESE ARE CERTAINLY THE AUTHORITY TO

WIDEN OR ALTER STREETS AND TO MANAGE, and in many instances to dispose of public property or vary its appropriation."

The Effect of Mr. Justice Story's Decision in the Van Ness Case as to the Streets was Unduly Extended in the Opinion of the Majority of the Court in 109 U. S.

Just as it must be admitted that there was no special trust as to Notley Young and his heirs with reference to the streets, so it must also be admitted that Notley Young and the successors to his title had no property in the streets. That is exactly what this court decided in the Van Ness Case, but to say that Notley Young and the successors to his title, which comprises all the owners of private property within the four hundred acres of Duddington Pastures included in the city of Washington, had "*not even the right to insist that the streets be maintained as streets*," is to say that all the inhabitants of the city of Washington may be lawfully subjected to "the cruel and unusual punishment" of being walled up in their houses. Yet such was the extension given to the decision of Mr. Justice Story by the majority of the court in the Steamboat Cases, 109 U. S.

The Assumption of fact in the Steamboat Cases (109 U. S. 672) that all Young's Land was Conveyed to the United States, and specific parts reconveyed to him not Supported but positively and incontrovertibly Contradicted by the Record in this case.

Though in the court below it was stated by counsel for the United States that the decision of this court in 109 U. S. disposed of the pretentions of these appellants, and though that expression is broadly repeated in the supplemental brief for the United States, the court will search in vain for any attempt on the part of counsl to support, in this cause, between different parties, and with a record giving

vastly wider information, the position taken by the majority of the court in 109 U. S. as to the true nature and effect of the deed in trust and its execution, and the true relation thereto of the maps and plats. The attempt has not been made either in citations from the record in briefs or in oral argument.

Special reference is made (Sup. Brief, p. 19) to the expression in the opinion in the Steamboat Cases that the transaction between Young and the public authorities was equivalent "to a conveyance by him to the United States in fee simple of *all* his land, . . . and a conveyance *back* by the United States to him," &c.

Whatever justification the court may have had in the case then before it, for this deduction, it was pointed out in the brief of these appellants (pp. 61–70) that there could be no possible justification for such a deduction from this record, and while counsel for the United States in their main and supplemental briefs have drawn very liberally from the opinion in the Steamboat Cases, they have made no attempt to show that the reasoning quoted from can be sustained upon the record now before this court.

It is, with the greatest respect, but with the utmost firmness and positiveness, *absolutely denied that Notley Young ever conveyed or agreed to convey all of his land to the United States or to any one for its use*, and we confidently challenge refutation of this proposition.

By reference to the deed from Young (Rec., Vol. 5, p. 46 *et seq.*), the only instrument of conveyance from him under which the United States can claim anything, *nothing* was conveyed to the United States, and the only things *agreed* to be conveyed to it were,—

> "all the said streets and such of the said squares, parcels and lots as the President shall deem proper for the use of the United States."

The residue of the land was neither conveyed nor agreed

to be conveyed to the United States nor to anyone for it. It was to be laid off into lots and the lots to be equally divided, one-half of which were to be reconveyed to Young together with any land not laid out in the city.

The other half was not to be conveyed to the United States nor to any one for its use, but to be *sold* and *conveyed to the* PURCHASERS.

Nor were the proceeds of sale even to belong to the United States. Even they were impressed with a trust *for the benefit of Notley Young*, viz: "In the *first place* be applied to the *payment in money to the said Notley Young* . . . for all that part of the land . . . appropriated as aforesaid to the use of the United States . . . and what thereof may remain . . . shall be paid . . . over to the President, for the time being, as a grant of money, and to be applied for the purposes and according to the Act of Congress aforesaid." [Act of July 16, 1790.] (Rec., Vol. V, p. 48.)

The provision of the Act of Congress as to these "grants of money" is (Sec. 4), "for defraying the expense of such purchases and buildings," that is, the purchases of land and constructions of buildings for the Government, provided for in Section 3 (1 Stat. 130).

Thus it is too plain for discussion that it was no part of the intention of the trust deed that the United States should have a conveyance of the entire land; on the contrary, it was strictly limited in its right to acquire land, to the streets and appropriations, while the proceeds of sale of land not so acquired or provided to be reconveyed to Young, were to be devoted to the payment to Young for his land appropriated, and the buildings for the government necessary to the establishment of the seat of Government, the consideration named in the deed.

In the face of these plain and inviolable provisions in the deed and of the undisputed fact that there never was conveyed to the United States, or to any one for it, in point

of fact, as much as a foot of Young's land, it is useless for counsel for the United States to quote passages from an opinion of this court, containing assumptions of fact not based upon this record, which this record in no wise supports, but on the contrary most conclusively contradicts.

If the proposition in the opinion in the Steamboat Cases can be supported by any evidence in this record, the diligent and able counsel for the United States would not have neglected the duty and service to this court of pointing out that evidence and showing by what act of Notley Young's the United States acquired title to *all* of his land in the face of an agreement whereby it could under no possible construction acquire the right to more than a specified part.

We respectfully submit that while the decisions of this court upon questions of law submitted to it are binding precedents until modified or reversed by the court itself, they can never have the effect of supplying in the case at bar facts shown by the present Record never to have existed.

The Conveyance of All Young's Land to the United States Never Required, but the Request was Limited to Streets and Reservations.

Within six years after the execution of Young's deed, and while all the parties having knowledge of the facts were living, the President of the United States, on March 2, 1797, called for a conveyance, *not* of the *whole* property but of that *part* which, as above shown, the United States was entitled to receive.

This demand is found in Vol. VI. p. 152 *et seq.*

It was not carelessly drawn, but only after full consideration by the Commissioners, who esteemed it a paper of very great importance as they very properly regarded it and the map annexed "as the authentic documents of the title of the public to the lands appropriated" (Vol. VI, p. 204).

Nor was it inconsiderately executed by the President, because we have his own statement that—

> "the instrument you transmitted to me, as mentioned before, *having been altered according to the advice of the Attorney General*, you now receive formally executed." (Rec., Vol. VII, 2242–2243.)

and the paper itself bears not only the signature of President Washington, but also the attestation of the Secretary of State and the Great Seal of the United States.

When that paper is examined it will be found to be utterly inconsistent with a demand for a conveyance of *all* of Young's land. That request is (Vol. VI, 152)—

> "to convey *all the streets in the City of Washington as they are laid out and delineated in the plan of said city hereto annexed*; and also the several squares, parcels and lots of ground following, to wit: [Here follow description of reservations] *as the same are also laid out and delineated on the said plan.*" (Vol. VI, 156.)

There was therefore not only no conveyance in fact of *all* Young's land to the United States, but not even a request therefor.

CONCLUSION.

Under the order of the court and by virtue of a stipulation of all counsel approved by the court, this cause was argued in four divisions as four separate appeals.

I. The Marshall heirs claimed the bed of the Potomac River and all the flats reclaimed by the United States, basing their claims on Royal Charters going back nearly three hundred years.

II. The appellants under the Kidwell Patent claimed a portion of the flats reclaimed by the United States, basing their claims on a patent issued in 1869 by the United States.

III. The appellants claiming above the Long Bridge claimed certain land and riparian rights in conflict with ths Marshalls, the Kidwells, and the United States, and they claimed rights in and over the reclaimed flats; and parts of their acknowledged property were required and taken for the public improvement of the flats.

IV. The rights of these appellants claiming between the Long Bridge and the Arsenal, all grow out of the trust deed of Notley Young; they neither arose in the dim past three hundred years ago, nor in recent times; between this property and the reclaimed flats flows the permanent channel of the Potomac River, where, from the foundation of the city to the present day, all commerce and communication by water with the city has been carried on. These appellants claim no rights or interests in the reclaimed flats, nor in any property whatsoever improved by the Government. The Government does not need any of their lands or wharves for any purpose connected with the improvement of the flats and the Potomac River, and it has not done one day's work nor spent one cent within the limits of any of these lands; nor is there any plan or purpose disclosed in any law or public act which contemplates any public work or expenditure within said limits; and no part of the land claimed by these appellants is or ever has been in the possession of the United States.

The establishment by this court in this cause of the Dermott Map, to which were attached the solemn instruments executed by Presidents Washington and Adams as a correct delineation of all the streets and public reservations and of the boundaries of the squares under the deeds in trust, would disturb no title, public or private, in any part of the city, but on the contrary would confirm all as they are held and enjoyed to-day by the United States and the private citizen.

On the other hand, the establishment of the Engraved

Plan as delineating the streets, reservations or boundaries of squares would utterly unsettle and derange nearly all the property, public or private, within the city; throw private property into the streets and streets into private property.

Finally, the court is earnestly and respectfully invited, in the interest of justice and for the protection of private and public right, to carefully examine and finally decide the true relation of these maps to the foundation of title in the city for the sake of the Nation, the community and the private citizen.

Respectfully submitted.

CALDERON CARLISLE,
WILLIAM G. JOHNSON,
For Appellants Aforesaid.

APPENDIX

CONTAINING

CITATIONS FROM THE RECORD READ IN ORAL ARGUMENT BUT NOT PRINTED IN THE MAIN BRIEF OF APPELLANTS,

WITH REFERENCE TO

THE DERMOTT MAP

AND

THE INSTRUMENTS TO WHICH IT WAS ATTACHED.

APPENDIX.

Letter of Commissioners to President Washington, dated January 31, 1797, transmitting draft of act (Rec., Vol. 6, p. 320):

> "SIR: We do ourselves the honor of enclosing to you a sketch of *such description of the public appropriations as will, we think, be sufficient to identify them in the deed from the trustees.* It is submitted for consideration."

General Washington's reply to Commissioners showing that act, as modified by the Attorney General, had been executed by him, and was therewith returned (Rec., Vol. 7, pp. 2242–2243):

> "PHILADELPHIA, 3d Mar., 1797.
>
> "GENTLEMEN:—Three things relative to the City of Washington call for my decision, *and this is the last day I have power to give any.*
>
> "The first respects the dispute with Mr. Law, touching the conveyances of lotts; the second to my approbation of the Plat for the Executive Offices; and the third to the Instrument you transmitted to me in your letter of the 31st of January.
>
> . . . . . .
>
> "*The instrument you transmitted to me, as mentioned before, having been altered according to the advice of the Attorney General, you now herewith receive formally executed.*"

Letter from Secretary Pickering to General Washington (Rec., Vol. 4, p. 1393):

> "DEPARTMENT OF STATE, March 21, 1797.
>
> "General GEORGE WASHINGTON:
>
> "SIR:—On the 18th I was honored with your letter of the 14th, covering an instrument directing the transfer of the streets and public lots in the city of

Washington from Messrs. Beall and Gantt to the Commissioners for that city. The seal of the United States has been affixed to it; and by tomorrow's mail I shall send it to the Commissioners, as you desire. Dr. Edwards has handed me the enclosed printed paper addressed to you by Sir John Sinclair, and says he expects some further communications to be forwarded to you from the same quarter. We have yet no official intelligence concerning General Pinckney.

"I am, with great and sincere respect, sir, &c.,

"TIMOTHY PICKERING."

Letter of Commissioners to President Adams, dated June 21, 1798, calling attention to fact that the act had failed to be attached to map (Rec., Vol. 6, p. 204):

"WASHINGTON, 21st June, 1798.

"SIR: At the close of the late President's administration he executed an act directing the trustees of the city of Washington to convey to the Commissioners the streets of the said city and the grounds which were appropriated to public use. In the press of business the plan referred to was not annexed. We now send it by Mr. Nourse, with the original act and the draft of another act, which appears to us proper to be executed by the present President in order to remove any objection to a compliance with the late President's request arising from the omission above mentioned. *As these acts are* THE AUTHENTIC DOCUMENTS OF THE TITLE OF THE PUBLIC TO THE LANDS APPROPRIATED, we shall write to Mr. Craik, or some other gentleman, to take charge of their return rather than trust them to the mail.

"We are, with sentiments of the highest respect, sir, &c.,

"G. SCOTT.
"W. THORNTON.
"A. WHITE."

Minute of June 21st, 1798, in Commissioners' Record as to said last-mentioned letter identifying map as that of Dermott by name (Rec., Vol. 4, p. 1518):

"It is as follows: 'Letter written to the President of the U. S. enclosing an instrument of writing, to be executed by him, authorizing a conveyance of the streets and public appropriations from the trustees to the Commissioners; *also the last Plan of the City made by Mr. Dermott and referred to in said instrument of writing forwarded to him by Mr. Joseph Nourse.*'"

Letter of Commissioners to gentleman who was to bring back map and instruments of writing (Rec., Vol. 6, p. 206):

"WASHINGTON, 21st June, 1798.

"SIR: Some days ago we sent the plan of the City of Washington to the President, in order to procure his directions to the trustees to convey the streets and public property in the city to the Commissioners. The plan is enclosed in a tin case, too large to go by the ordinary conveyance of the mail. Mr. Joseph Nourse was so obliging as to take the charge of it to Philadelphia, and we request the favor of you to bring it with you when you return, as *the enclosure is of great importance,* BEING THE EVIDENCE OF THE PUBLIC PROPERTY IN THE CITY.

"We are respectfully, &c.,

"G. SCOTT.
"W. THORNTON.
"A. WHITE.

"WM. CRAIK, Esquire, Phil'a."

Letter from Secretary Pickering returning map with President's approval by the hand of very gentleman to whom Commissioners had written on the subject (Rec., Vol. 2, p. 661):

"DEPARTMENT OF STATE, July 25, 1798.

"GUSTAVUS SCOTT, WILLIAM THORNTON AND ALEXANDER WHITE, *Commissioners of the City of Washington.*

"GENTLEMEN: The President *has executed the Act proposed* in your letter of the 21st of June, *and I now return it, with the Act of the former President, to which it*

refers, ANNEXED TO THE PLAN OF THE CITY OF WASHINGTON, authorizing the Trustees to convey to the Commissioners the streets in that city and the grounds which were appropriated to public use. *Mr. Craik takes charge thereof*, and of the plan and elevation of the Treasury Office which I received of Mr. George Hadfield.

"I have the honor, etc.,

"TIMOTHY PICKERING."

Letter of Commissioners to Chairman Dennis (Rec., Vol. 4, pp. 1606–1612):

"These changes from L'Enfant's plan took place in the year 1792, and the published plan appears to have been engraved in October of that year. It has since been pursued in all the operations in the City, under the direction of the Commissioners, AS FAR AS IT WAS PRACTICABLE; but *the city not having been surveyed*, and this plan *being made partly from L'Enfant's draught*, and partly from materials possessed by Mr. Ellicott, it was probable that it would not correspond with an actual mensuration."

. . . . . .

After alluding to President's letter of December 26, 1796:

"This letter not containing instructions to include the spaces of ground which were the subject of it in the Act of appropriation, the draught of an act was prepared and transmitted to the President describing grounds which were unanimously agreed to have been reserved for the purpose of appropriation; which draught, after being perused and in some respects altered by the Attorney General, received the President's signature."

. . . . . .

"Squares Nos. 728 and 729 on the original plan appear to recede from First Street east; whereas, in fact, they are brought up to it.

. . . . . .

"The intention of the memorial was to persuade the President that it was necessary to cause a complete plan of the city, including a Water Street, to be made and established; so that there could be no departure therefrom. It was referred to the Attorney General, who advised against making a new plan 'because the plan to which the President's signature is annexed is sufficiently authenticated and supersedes all prior Plans'; against making a plan unalterable in the sense of the memorialists, because the appropriated grounds may be wanted for one purpose at this time and for another at a future day; and against making the proposed Water Street in the present state of the City funds, because it was more necessary to build houses than to reclaim land out of the water.

. . . . . .

"The trustees allege that the description of the appropriations does not agree with the plan to which it refers. In this they are incorrect. It agrees with the utmost precision."

Report of Chairman Dennis to House of Representatives (Rec., Vol. 6, pp. 295–7):

"This is generally known by the appellation of the engraved plan. *It was, however, found, on actual survey, that* THE ENGRAVED PLAN WAS IN MANY RESPECTS INACCURATE, *and that the actual situation of many streets and squares differed so essentially from the situation which they seem to possess on the face of that plan that, though they appeared* ON PAPER *to lie some distance from the water, they were found to be situated* IN THE POTOMAC. This circumstance rendered some deviations from that plan inevitable. In some other cases, grounds originally appropriated to public use have been surveyed into building lots, and divided as such between the United States and the proprietors. In certain other cases, the angles formed by the intersection of streets and avenues, and which seemed to be a kind of property which neither comes within the description of streets, public appropria-

tions, nor building lots (which are the only descriptions of property mentioned in the deeds of trust), have been surveyed also into building lots, and in some instances divided between the proprietors and the public, and added to the plan of the city. *The alterations made in the instances above enumerated have been incorporated into the plan of the city, now in the Commsssioners' office. This plan has been signed by Mr. Adams, in conformity with which the trustees were directed by him to convey the public grounds to the United States, and* IS CONSIDERED BY THE COMMISSIONERS AS THE TRUE PLAN OF THE CITY. *This plan has never been engraved or published.*

. . . . . .

"Your committee are of opinion that *suffering the engraved plan, which is no longer the true plan of the city, to continue to pass as such, may be productive of great deception in purchasers; and that measures ought to be taken for its* SUPPRESSION; that measures ought to be taken also for obtaining from the trustees a conveyance of the streets and other public grounds, and that a plan which, as far as practicable, shall prevent all further innovations, ought to be engraved and published under the direction of the President of the United States."

Office Supreme Court U. S.
FILED
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JAMES H. McKENNEY,
Clerk.

No. 49.

Sup. Ct. Bx. of Howard for Appts.

49

Filed Nov. 26, 1898.

IN THE

Supreme Court of the United States.

MORRIS AND OTHERS

vs.

UNITED STATES.

Supplemental Brief and Argument of John Howard for the Heirs of John Marshall.

On page 7 of the principal brief for these parties, it is stated, in a note, that *Browne* v. *Kennedy*, 5 H. & J., 195, was not referred to in the brief for the United States in the court below, nor in the opinion of the court. That was true as to the brief, but not as to the opinion of the court, as, through inadvertence, it was stated to be. The matter is not important, except that it is proper that this correction should be made to avoid any injustice to the court. Of more importance, is the following explanation and statement:

On page 30 of the brief for the heirs of John Marshall this quotation was made from the Report of the Virginia Commissioners to the Governor (1872), as to the boundary line between Maryland and Virginia:

"Lord Baltimore was restored to his proprietary right in Maryland by Charles II, subject to the grant made to Lord Hopton and Culpeper. The latter grant was never disturbed

or questioned by Lord Baltimore or by any proceedings before the courts of law or at the Court of St. James. He yielded the whole Northern Neck to Lord Fairfax, and how and by what authority or act did he ever regain the Potomac river? Both alike, the land and the river, were alike granted, and the two were alike granted, and the two were alike retained within the jurisdiction of Virginia." (Record, Vol. III, pages 1160-1162.)

In preparing that brief (as also afterwards), I was studious, *ex-industria*, to discover, if I could, some order of king in council, or other *express* official authority, for the statement that Lord Baltimore was restored to his rights in Maryland, subject to the grants made to Lord Hopton and Lord Culpeper and others, but I could find none in the Virginia copies of colonial records obtained from London; and, knowing that the governmental powers of Lord Baltimore in Maryland had been twice suspended, and twice restored—suspended the first time by the Cromwell regime, and restored by Charles II, after eleven years of ouster, and suspended the second time by William and Mary, in 1691, and restored by George I, in 1715—I pushed the inquiry as to both restorations, by correspondence with several of the most eminent historical writers in this country, on the colonial periods in question. One of these replied that he was under the impression that the statement was correct, but that he could not at the moment put his finger upon the authority for it, and from the others the information received was not contradictory, but tentative only, and unsatisfactory. I determined, therefore, to leave the statement, for what it was worth, as I had found it, in Rec., Vol. III, pages 1160–1162, from which it was quoted in the brief for the heirs of John Marshall. But, having understood that the Report in which the statement was made had been drawn by the late Hon. Henry A. Wise, as chairman of the commission, and believing it to be impossible, from his known great intelligence and high official and personal character, that so important an official statement should have been so positively made without what was considered to be valid foundation, I sought, but could not obtain, a full copy of the Report—the volume containing it hav-

ing disappeared from the General State Library of Virginia, to which it properly belonged. Within the last few days a copy of the volume has been discovered in the State *Law* Library, and the facts upon which the statement was made therein clearly appear, and as those facts are of an historical character, of which the Court will take judicial notice, it is proper that they should be here recalled, not, indeed, upon the official authority of that Report, but upon historical sources of acknowledged authenticity, not therein cited.

The facts are these: Upon the death of his father, Charles II, in 1649, asserted his rights to the Crown, was recognized by Scotland as the lawful king, invaded England in that capacity, and was defeated and went into exile. Meanwhile at Breda he executed to Lord Hopton, Lord Culpeper, and others, a grant of what was subsequently known as the Northern Neck. During the *interregnum* of Cromwell and the Commonwealth, Lord Baltimore had been removed and ousted from his governmental powers in Maryland, and continued so ousted, as has been stated, for about eleven years.

On the 1st of May, 1660, the people of England, in convention assembled, called by the Parliament, and therefore known as the Parliament Convention, invited Charles II to return and resume his rights as king. "On May 8th, 1660, the two houses of Parliament proclaimed him as King of England, Scotland and Ireland, at Westminster, at Whitehall and in the city of London; and although the King had not arrived, the restoration of monarchy was complete." (Knight's History of England, Vol. IV, page 236). And, in a recent philosophic work of great merit, it is stated that "The Parliament Convention, invited Charles to return and continue his reign, which was proclaimed as having commenced on the day of his father's execution."—Origin and Growth of English Constitution, by Hannis Taylor, Vol. II, p. 357. In the Parliamentary History of England, Vol. IV, p. 10, *et seq.*, is given a minute narrative of the whole matter of the recall of Charles, and everybody is familiar with Hume's graphic account of the general popular rejoicing on his return, and of deaths occurring from excess of delight, and with Scott's glowing chapter

in "Woodstock" of the triumphal procession of Charles and his friends as he rode from Rochester to London to receive his own again, as the hereditary king of England, to whose rights he had been completely restored.

Among the first acts of the King, when fully restored to those rights—namely, on the 8th of May, 1660, the day on which he had been proclaimed king—was the execution of a renewed grant to Lord Hopton, Lord Culpeper, and others, of the Northern Neck. He arrived in England on the 29th of May, 1660, and ascended the throne, of which, with such joyful unanimity, he had been declared the lawful and hereditary king.

This renewal of the grant to Lord Hopton and others was obviously made in contemplation of that event. It was never revoked by Charles during his long subsequent reign of twenty-eight years, but, on the contrary, was ever acquiesced in and recognized by him as a valid grant, and it was accepted and acted upon as such by the grantees, and after his death, his brother, James II, upon the surrender of that instrument, by the then owners thereof, executed another grant, reciting and confirming the two former grants, and conveying the property to Thomas, Lord Culpeper, who had become the purchaser and sole owner of the same. There can, therefore, be no doubt of the validity of the original grant at least from the 8th of May, 1660, and indeed the whole matter was conclusively put at rest by the opinion of this court in *Fairfax* v. *Hunter*, 7 Cranch, 603, not only in recognizing the validity of the grants of Charles II and James II, but founding its judgment upon the construction of those grants. Lord Baltimore was restored to his governmental powers in Maryland in November, 1660, when Charles II was firmly seated upon the throne. But meanwhile the grant of the Northern Neck, including the Potomac river, had taken legal effect and was in full force, and ever afterwards so remained; for Lord Baltimore never questioned the validity of that grant either in any court of law or at the court of St. James, though he had full notice of those grants, the two last of which, certainly, were enrolled in the colonial office in London, open to the inspection of all the

world, and to which all the world was bound to look in respect to all grants touching the English colonies in America. Of course in accepting possession of his governmental powers, it was in subordination to the intermediate grant of the Northern Neck, wherein had been exercised the *jura regalia* as to the Potomac, as a branch of the royal prerogative incident to the powers of government which had been resumed by the Crown, the *jus privatum* passing to the grantees, subject to the *jus publicum* remaining in the Crown.

Nor is this all. William and Mary, who had ascended the throne in 1689, in 1691 removed the then Lord Baltimore from his government in Maryland and resumed the powers of government belonging to the Crown, which was done, as is well known, in accordance with the opinion and advice of Lord Chief Justice Holt, given to the Council and the King.

Nor can a reasonable doubt be entertained of the constitutional regularity and validity of that act, since though the property rights of the Proprietary might not be resumed without his consent, the powers of government inherently vested in the Crown, and held in trust for the benefit of the whole people of the British Empire, could only be delegated and not irrevocably surrendered or ceded away to a subject without a violation of the trust and the commission of a *felo de se*, and, indeed, the reservation of sovereignty in the Baltimore charter —the recognition of ultimate allegiance due to the Crown and ite sovereign dominion—was incompatible with an indefeasible grant of governmental powers, unless it should first be expunged from that instrument. Hence those powers were lawfully revoked by William, and remained in the Crown until 1715—a period of twenty-four years—when they were restored by George I to the then existing Lord Baltimore, and were resumed by him. Here, again, was an acceptance of the changed condition of things as to the Potomac, and subject to that change—a practical recognition, in fact, of the grants which had been renewed and confirmed to Thomas Lord Culpeper by James II in 1688.

Even as between Maryland and Virginia (if it were a matter between them), there would therefore seem to be great, if

not conclusive force, in these facts and considerations, to justify and authenticate the statement that the several restorations of Cecilius Calvert, Baron of Baltimore, in 1660, and of the existing Lord Baltimore, in 1715, to the Province of Maryland, were made and accepted subject to the territorial rights of the Colony of Virginia in the Potomac, as always claimed by that colony. The conclusion indeed would be irresistible, if Virginia had been entitled to claim the Potomac in its own right by virtue of the grants of Charles II, and James II, to the Northern Neck. But such was not the fact, and, on the contrary, as has been seen, the grants were made and confirmed to private British subjects, their heirs and assigns in fee, through whom the Marshall heirs claim title, not, indeed, to the Potomac as property, in fee simple, but to the *jus privatum* in its bed and waters to the high-water mark, subject to the *jus publicum*, as stated and explained in the principal brief of the late Mr. Brooke and myself, for those parties in this suit. But these facts make the claim of those parties all the stronger. For if the *jura regalia* in respect to the navigable waters of Maryland, passed by the charter of Charles I to Lord Baltimore, it was as an incident of the governmental powers thereby conferred upon the Proprietor, and all of those powers had been resumed by the English Government and Crown before either of the two restorations of the Lords Baltimore, and in the meanwhile, as shown, the grant of the Northern Neck had taken legal effect as an exercise of the powers of the Crown, including the *jura regalia* as to navigable streams, embraced in the grant, and specially including the Potomac. And whatever may be said of the rights of the Crown to resume a grant to *upland*, or *terra firma*, without the consent of the grantee, the right to resume governmental powers, it is submitted, has been clearly shown, and it is understood to have been exercised, without question, during the Colonial period, as to other British-American colonies, and certainly the validity of its exercise as to Maryland has never been brought into legal issue, and it is too late now, after the lapse of two hundred and fifty years, to suggest for the first time an inquiry upon the subject. But if this be true, the acceptance

on two separate occasions of restoration of their governmental powers by the Lords Baltimore, after those powers had been exercised by the Crown in favor of the grantees of the Northern Neck, in respect to the Potomac, would seem to be much stronger evidence of the absence of all claim in the premises by showing a practical acquiescence in, and acknowledgment of, the validity of the grants as to the bed of the Potomac and its waters than would any mere order of the King and council upon the subject.

As to the Award of the Commission of Arbitration for the Delimitation of the Boundary Line between Maryland and Virginia.

It is said that the Northern Neck grant describes the Potomac as being "in Virginia," and that the boundary line thus ascertained places the river within the territorial limits of Maryland. But obviously a misdescription of the locality of the river could not vitiate the grant, if the subject of the grant was sufficiently identified therein, and the concluding clause of the grant expressly provides for the contingency of such a misdescription. Rec., Vol. III, p. 1132.

A more pretentious but equally fallacious contention is made that the rights of the Marshall heirs were concluded, alienated and destroyed by the said award as to the true divisional line between the two States. But neither the United States nor the Marshall heirs were parties to that proceeding, or had any opportunity to appear and prove their rights of property in the premises, and therefore neither could be bound by the proceedings; nor had that tribunal, created for the special purpose of determining a political divisional line, any jurisdiction to inquire into, consider, or adjudge the rights of private property within the disputed area. If such had been the scope and purpose of the Commission, obviously upon the fundamental principles of jurisprudence, provision would and should have been made in the constitution and powers of the Commission for the summoning of all parties in interest, and affording to all an opportunity to be heard in the assertion or defense of their respective rights. But nothing of the sort appears in the mutual agreement of the two States

to submit the political line between them to the delimitation of a joint commission. If that Commission had undertaken to decide that the United States had no rights of property in the Potomac river, as it flows by the city of Washington, in the District of Columbia, the decision would at once have been repudiated by the Government as having been made without jurisdiction and *ultra vires* as to it, and very properly, and for the obvious reason that the Commission had nothing to do with its property rights in the premises. But if that be true as to the United States, it must be equally true as to the Marshall heirs.

It is true that the United States, by an act of Congress, approved March 3, 1879, accepted the award of the Commission of delimitation as the true political line of jurisdictional division between the two States. But it is incredible to suppose that by so doing the United States intended to accept the award as the judicial determination of its alleged rights of private property in the Potomac River. On the contrary, its own legislation subsequent to that award (which was made in 1878), created in 1886 this special tribunal, under which the present proceedings were had, and now under review by this court, and under which all persons and corporations were invited to appear and assert their respective rights and interests, and it was by virtue of the special jurisdiction thus conferred on the Supreme Court of the District of Columbia that the bill was filed in this case, and the Marshall heirs were convened and required to assert their rights. And now, after having accepted the invitation, and asserted their rights, objection to the consideration and adjudication of those rights by the tribunal created for the purpose (with special appellate jurisdiction conferred upon this court) is made by the counsel for the United States, upon the ground that those rights have already been adjucated by Commission appointed for the determination of the said boundary line. With all deference and respect, the extravagance of the proposition would seem to furnish its own refutation. The creation of a special jurisdiction for the adjudication of the rights of all parties in interest was itself a sufficient and complete acknowledgment and recognition on the

part of the Government that its property rights, as to the Potomac River, were not adjudicated or affected by the award of the Commission as to the true political divisional line.

But if we are to go into the law upon the subject in respect to agreements to settle co-terminous boundaries, it will be found that the numerous cases cited on page 29 of the brief of the learned counsel for the United States, commencing with *Poole* v. *Fleger*, 11 Pet. 209, and concluding with *Wharton* v. *Wise*, 153 U. S. 166, have no application to this case. In the leading case of *Poole* v. *Fleger*, the facts were that within a disputed area of boundary between two States, each State had made grants of land, and the whole scope and effect of the decision was that upon a final determination of a political line of sovereignty and jurisdiction between the States the grants, which had been made by either beyond its sovereignty and jurisdiction were void, and for the obvious reason that neither State had any right or power to grant and convey lands beyond its sovereignty and jurisdiction, and therefore that such grants were *ab origine*, *ultra vires* and void. And in all that class of cases of grants made by diverse sovereignties, within a disputed area, each claimant must stand upon the rights derived from its own sovereign. But nothing of the sort exists in this case, which is of an entirely different character.

In the first place, the United States claim through the State of Maryland, and the Marshall heirs claim through and from the English Crown. The State of Virginia had nothing to do with the determination of their rights in submitting to arbitration the delimitation of the political line between the two States.

In the second place alike, the claim of Maryland and the claim of the Marshall heirs were each derived from the same source, the English Crown, and it would seem to be too apparent for remark that the Commission for the settlement of the political line of division had nothing to do with the private rights of property in that settlement alike derived from the Crown, since the validity of each depended upon the authority and circumstances of the grant.

As to the contention in the brief of the counsel for the United States of misrepresentation and fraud in obtaining the several grants of Charles II and James II to the Northern Neck.

This is the first time, in more than two hundred and fifty years, that any such suggestion was ever made. All of the parties to the several transactions have long since been dead, and what representations were made to the two English kings are not, and can never be known, and with the bodies of the parties themselves, are entombed in the buried dust of centuries. But known and established facts and circumstances of the matter absolutely exclude the possibility of any ground for such a suggestion. The geography, and, much more, the topography, of the boundaries of the different colonies was very little known at the time, and for long afterwards, and in several cases the boundaries have had to be settled by agreement, or arbitration, or litigation, with the whole subject matter of which this court is familiar from the numerous appeals that have been made to its jurisdiction for the settlement of disputed boundaries, and incident rights, and its adjudications thereon. And, as will presently be seen, a Lord Baltimore himself, and his descendants, had a long legal controversy after long previous unavailing negotiations, with William Penn and his descendants, as to the true boundary line between Pennsylvania and Maryland, the Lord Baltimore claiming more than two degrees of latitude on the northern boundary (including three counties of Delaware) of his grant, and Penn and his descendants claiming that he got the grant by fraud and misrepresentation. The ground of the contention of the Penns was that Baltimore had represented to the King that the disputed area was uninhabited except by Indian savages, and was therefore open to grant by the Crown, while, in point of fact, before 1632, the date of the Baltimore charter, the Dutch and Swedes had made a permanent footing and settlement within the disputed area. Whether that condition was well founded or not, has ever been the subject of dispute between the historians of Pennsylvania and Maryland. Without canvassing the true facts of that controversy, I think it permissible to say that, upon an examination of the different his-

torical authorities, I came to the conclusion that Proud's History of Pennsylvania stated the truth of the matter when averring that the disputed area was already occupied by the Dutch and Swedes when the Baltimore charter was granted. See Proud, Vol. I, p. 110. But I also think it practically immaterial what were the true facts, and for the reason that the boundary lines between the colonies were then little known, or not known at all; and especially as the knowledge of latitudes at that period was extremely imperfect, which fact abundantly appears in the case between Penn and Lord Baltimore, in 1 Vesey, Sr., 444, in which Lord Chancellor Hardwicke stated the point very strongly against Lord Baltimore.

But if this indulgence of judgment is to be accorded to Lord Baltimore in the obtaining of his charter, the same facts and considerations ought to be regarded as to the obtaining of the charters for the Northern Neck, and with much better reason.

The true boundary line between the Colonies of Virginia and Maryland had been the subject of contention and dispute between them from the time of the grant of Charles I to Lord Baltimore, and the Virginia claim was founded, among other grounds, upon the great uncertainty in the charter of Charles I, as to the Southern boundaries of the territory granted, which uncertainty was subsequently increased by the obscuration, or obliteration, in consequence of the lapse of time and the operation of natural causes, of the loose landmarks in the charter, of which facts the long struggle between the two colonies and their subjects, in mutual attempts at the occupation or seizure and appropriation of the undefined and disputed area, were the legitimate results, with the usual incidents characteristic of border enterprise, conflict, and warfare. Happily, however, with the exception of the belligerent seizure of Kemp Island by Clayborne, and the naval skirmishes which ensued between the pinnaces of the two parties, the contest was of a peaceable character, each colony asserting its supposed rights by grants and other acts in respect to the Potomac River and the Chesapeake Bay, as if the same were within its own legitimate territory and jurisdiction.

In this conditions of things, and without going into further details, the two Colonies and States made frequent efforts to accomplish a friendly and just delimitation of their co-terminus boundaries, but in vain until, by the joint commission of 1878, of which the award is given in Rec. Vol. 7, pages 21–24. From this statement of known facts it is at least as unreasonable to charge the grantees of Charles II and James II with misrepresentation and fraud in obtaining the grants for the Northern Neck, as it would be to make the same charges against the original, Lord Baltimore, in his obtaining the charter from Charles I for the Province of Maryland. It is fair to presume, under the circumstances, and especially after the lapse of centuries, that alike the charter to Baltimore, and the grants for the Northern Neck, was obtained and made in perfect good faith, and that there was no intentional misrepresentation in either case. And as to the grants for the Northern Neck, the most that can be said, and all that has been said, is, that there was a misdescription as to the political locality of the Potomac, an error, if it was an error, fully covered by the concluding clause of the final grant, expressly providing for such a contingency ; and an error, if it was an error, which, after generations of doubts and wrangles, and efforts at the settlement of the true line of jurisdiction, was discovered only a few years ago by the special joint commission created to ascertain the correct delimitation of that line.

But if we were compelled to go into an inquiry as to the *bona fides* of the dealings with the English Crown in these matters, the gauge would not need to be declined by the claimants in right of the grants to the Northern Neck. The inquiry would go, not only into the truthfulness and good faith of the representations made to Charles I, upon which the charter was granted to Lord Baltimore, but it would go to an inquiry as to the genuineness and authenticity of the charter itself. For it is well known that, if the original charter, as it passed from the seals, was ever enrolled in the colonial office, or elsewhere, it was abstracted, and has never since been seen, to the knowledge of any human being, unless by that Lord Baltimore. It is doubtful if it ever was enrolled at all, and it is certain

that no authenticated copy of the charter—a copy officially certified and authenticated as a true copy of the original—was ever enrolled. It is also known that some five or six different alleged copies of the original are extant (the last one in 1725, as the "corrected" copy), but there is no proof whatever that any one of them is a true copy of the charter as it passed from the seals, and a very suspicious circumstance is, that in all of those alleged copies the boundaries of Maryland as to the Potomac are described in such law Latin of the times as to have challenged the learning and acumen of modern scholars to discern the meaning of the description, and the whole is made largely to depend upon the gender and affiliation of a word—"deinde vergendo versus meridiem ad ulteriorem dicti fluminis ripam et *eam* sequendo," &c.

And it is observable that the United States, as if embarrassed by its spurious riches, has foreborne to file with its bill in this case any one of those alleged copies of the charter, and thus put its authenticity in issue. See Appendix by Brandt Mayer (1866), to Bishop Hawks' Edition of "A Relation of Maryland," for a circumstantial account of the charter and its alleged copies; and also the opinion of the majority of the arbitrators of the aforesaid Boundary Commission (understood to have been drawn by Judge J. S. Black), whose quaintly learned and acute criticism and construction of the doubtful text present curious reading.

And now as to the true and real legal position in which the United States as a claimant of private property in the Potomac River Stands to the Marshall heirs.

This will the better appear by considering this proceeding as if it were either an action of ejectment by the United States against the Marshall heirs for the *locus in quo*, or as a bill for the specific performance of the award as to the boundary line between Maryland and Virginia. If it were an action of ejectment, the United States would, of course, have to stand upon the strength of its own title and not upon the weakness of that of its adversaries. Its first step would be to offer an alleged copy of the charter of Lord Baltimore; but if so, how would its genuineness be proved? Neither the original nor an

attested copy would be found either in the English Colonial Office in London or among the records of the Council, or of the State Department. (See the *Appendix* above mentioned of Brandt Mayer to Hawkes' edition of "A Relation of Maryland.") And if it were contended that a grant should be presumed from long possession by the United States, or the State of Maryland, the proof would utterly fail, becaue the *locus in quo* (the bed of the Potomac and its waters), is not capable of actual possession by *pedis positio*, as was well said by this court in respect to such property, in *Shively* v. *Bowlby*, 152 U. S., p. 11; and moreover, there never was a time when either the United States or Maryland had undisputed possession of the premises.

But if even the original charter were produced on the trial, and it included the Potomac as the southern boundary of Maryland, a conclusive defence to the action would be the grant of Charles II and James II to the Norrhern Neck by which the *jus privatum* in the Potomac passed to the grantees (subject to the *jus publicum*), while the powers of government, including the *jura regalia*, had been resumed by the Crown, as has been above shown. And if the United States were to rely upon the confiscation legislation of Maryland of the property of Henry Harford, the reply would be, in the first place, that such legislation was void as being the attempted exercise of a power *de jure belli* which Maryland never possessed; and in the second place, that if the confiscation legislation were valid, the *jus privatum* in the Potomac was not the property of Henry Harford, but of the grantees of the Northern Neck, through whom the Marshall heirs claim title. And if the United States relied upon the award of the boundary commission for the ascertainment of the political line of division between Maryland and Virginia, the reply in the first place would be that the commission had no jurisdiction to settle the rights of private property of either the United States or the Marshall heirs; and in the second place, that if it had such jurisdiction, neither the United States nor the Marshall heirs were parties to that proceeding, or bound thereby, as has been shown. Perhaps that matter would be better presented if this proceeding

were a bill in equity by the United States against the Marshal heirs for the specific performance of that award, as seems *now* to be allowable in such a case, (3 Pomeroy's Equity Jurisprudence, § 1402), though not so formerly. *Penn* v. *Lord Baltimore*, 1 Ves. Sr., 449, is instructive and conclusive on the point as to parties in such a case. The bill was filed by Penn for the specific performance by Lord Baltimore of certain articles of agreement for the settlement of the disputed boundaries between Pennsylvania and Maryland, and it was objected that the bill would not lie because the planters within the disputed area were not made parties, and the objection would plainly have been sustained, but that the tenure of the planters was expressly preserved by the agreement, which is not the fact in this case, or if it be, and whether it was or not, the property rights neither of the United States nor of the Marshall heirs were affected by the award in question.

I have thus endeavored, in this supplemental brief and argument, to render a satisfactory reply to the able and voluminous brief and argument filed by the learned counsel for the United States (in non-observance of the rules of court), only on the day the case was called for hearing, and which I had no opportunity to examine before the oral argument; and if, in so great a case, as the sole surviving counsel for the worthy descendants of so great a man, I have shown a pertinacious advocacy, I trust that something will be pardoned to the principles and inspiration of the wise injunction of Edmund Burke, that, in the right administration of justice, it is the duty of the Judge to receive and weigh, even at the latest hour, and of course the duty of the advocate to adduce every element of evidence and consideration of reason tending to the discovery and establishment of the truth.

JOHN HOWARD,

For the Heirs of John Marshall.

Richmond, Va., November 19, 1898.

Office Supreme Court U. S.
FEB 24 1899
JAMES H. MCKENNEY,
CLERK.

No. 49.

Sup. Ct. Bk. of Howard for Clerks.

Supreme Court of the United States.

Filed Feb. 24, 1899.

MORRISS AND OTHERS

vs.

UNITED STATES.

Memorandum, presented by John Howard, of corrections and explanations in respect to his supplemental brief for the heirs of John Marshall.

It is with great reluctance and regret that I have again to invoke the courtesy of the court in this case, but as it is in correction and explanation of apparently erroneous statements of historical facts made in my supplemental brief for the heirs of Judge Marshall, which may be deemed of importance, and especially, if unexplained, might give rise to wrong impressions, I deem it a duty alike to the court, the parties, and myself, to make the correction now, as soon as the supposed errors have been brought to my attention, and I have had opportunity for further and more accurate investigation than was possible under the circumstances in which that brief was, of necessity, hastily prepared, as heretofore shown in a letter to the Chief Justice in tendering that brief to be filed. I have recently received a letter from an accomplished archæologist in Maryland colonial history, to whom I had sent a copy of the brief, stating that he had always understood that Lord Baltimore was restored to governmental powers in Maryland under the regime of Cromwell in 1658, and (inferably) not by Charles II. in November, 1660 (as stated on p. 4 of the brief), when that monarch was firmly seated upon the throne. This intimation was a great surprise, as it had never occurred to me to suppose it possible that the stern covenanter would permit a Catholic nobleman to be appointed or restored to any imporant office under his auspices, and I did not, therefore, look particularly into the subject, and the less so because I had seen

it stated upon good authority and had ever understood that the restoration was made by Charles II. in November, 1660. The colonial history of the period is obscure and difficult, and Burk, the best Virginia historian of the times, complains that there were at his command no adequate materials, reproaches the ignorant attempts of others to state the facts, and makes no attempt himself at details. Burk, vol. 2, 118, 119, *et seq.*, and Campbell, 1860 (as also the English histories), is silent on the subject. But the Maryland records were better preserved, and the Maryland historians do undoubtedly state that Baltimore was restored to governmental powers by a compromise with Cromwell's commissioners in 1658.

Those of them, however, who specifically refer to the matter also show that the restoration was only partial, perturbed, and temporary, and soon prevented of effect, or overthrown, by a successful conspiracy and rebellion, of which Baltimore's lieutenant and representative, Fendall, was the head; that the restoration was not established and made permanent until after the recall of Charles to the throne, in May, 1660, and that it was then accomplished only by the prompt and direct action of Charles; and, therefore, that the statements made in the said supplemental brief were substantially true.

McMahon (1831), the earliest of the Maryland historians, mentions the restoration of 1658, the rebellion of Fendall, and the efficient action of Charles II in the permanent re-establishment of the proprietary power in November, 1660. (See pp. 211–213). Bozman (1837) the next historian in order of time, gives a full account of the terms of the restoration of 1658, and shows that it was made in consequence of a compromise between the authorities of Cromwell, who had subdued both Virginia and Maryland, and the agents of Lord Baltimore; but Bozman's work ends with the account of those proceedings, in 1658.

McSherry (1848), pages 80, 84, in referring to the restoration of Baltimore, in 1660, states that the people of Maryland "joyfully submitted to Philip Calvert, whom Lord Baltimore appointed governor, upon receiving the intelligence of Fendall's rebellion, and who appeared amongst them *armed only with the proclamation of the King, commanding all his faithful subjects to yield him obedience.*"

Scharf's, the latest and most complete history (1879), Vol. I,

page 267, states: "The rule of this revolutionary government was of short duration. On the 24th of June, 1660, the Lord Proprietor commissioned as governor his brother, Philip Calvert, *and having procured from Charles II*, who was just restored to England, *letters commanding all officers and inhabitants of the province to aid him in the re-establishment of his government*, and *a similar command of assistance to the government of Virginia*, he ordered Governor Calvert to proceed against the rebels, either in the courts or by martial law, but on no account to permit Fendall to escape with his life. Philip arrived in the province soon after, and on the 11th of December, 1660, was sworn in as governor of the province by the provincial court held at Patuxet."

Baltimore, in fact, had neither money, men, nor arms, nor ships, while Charles and his devoted Parliament had control of all the finances and armies and navies of England, and as, just two years before, the mere appearance in the waters of Virginia and Maryland of two ships of Cromwell, with less than a thousand men, had been sufficient to subdue both provinces, so the knowledge that Charles had commanded his subjects, in both, to aid Baltimore in regaining the government of Maryland, had the same effect.

The accurate date of the actual restoration is shown by the records of the Council proceedings of Maryland to have been in November, 1660, as stated in the brief. For it therein appears that on the 19th of November, 1660, Philip Calvert, the Lieutenant-Governor of Baltimore, by his "special order and authority," issued the following proclamation:

"Although it can noe way be doubted that his Maties Right and Tytle to his Crownes and Kingdoms is and was every way compleated by the death of his Most Royall father of Glorious Memory without the Ceremony or Sollemnity of a Proclamation, yet since Proclamations in such Cases have bene allwaies vsed to the end that all good Subjects might upon this occasion testify their Duty & respects, and since the armed Violence and other the Calamities of these many yeares last past have hitherto deprived vs of any such Opportunity wherein we might express our loyalty & allegience to his Maty Wee therefore Governor and Councill of this Province of Maryland, and other his loyal subjects here present, By the Speciall order and authority of the Right honnoble the Lord Proprietor of this Province, Doe according to our allegience & duty, heartily joyfully and vnanimously acknowledge and proclaime, that imediately upon the decease of our late Sovereign Lord King

Charles the Impereall Crowne of the Realme of England and of all the Kingdoms Dominions and Rights belonging to the same Did by inherent birthright and lawful and vndoubted succession descend and come to his his Most Excellent Maty Charles the Second as being lineally, iusly and lawfully next heire of the bloud Royall of this Realme, and that by the goodness and providence of All Mighty God Hee is of England, Scotland, ffrance and Ireland the Most Potent Mighty & and vndoubted Defender of the faith &c. And therevnto wee most humbly and faithfully doe submitt, and obliege our selves our heires and Posterities for Ever Dated the nynteenth of November, 1660

God save the King and the Lord Proprietor.

PHILIP CALVERT."

See Council Proceedings of Maryland (1636-'67), p. 392, *et seq.* That document was by Lord Baltimore, a solemn acknowledgment and assertion, indeed, of the constitutional right and accession of Charles to the throne from date of his father's death in 1648, and, hence, of the validity of his executive acts as king —*de jure*, if not also *de facto*—(the usurpation of Cromwell being regarded a mere legal *vacuum*), including the grants of the Northern Neck, and especially the renewed grant of the 8th of May, 1660, when Charles was both *de jure* and *de facto* the proclaimed and acknowledged king of England.

So much for that matter. And now a few words as to the second ouster and restoration of the Baltimores. The supplemental brief, p. 5, states the second ouster was made by William in 1691. The particular facts were that in 1689 there was formed in Maryland "an association in arms for the defence of the Protestant religion, and for asserting the rights of King William and Queen Mary to the province of Maryland and all the English dominions," which association effected a revolution in the government of Maryland; that William approved the acts of the revolution, and under the advice of Lord Holt, given to the Privy Council (of which he was a member), took the government of the colony into his own hands in 1691, and appointed Sir Lionel Copley governor; and that the province remained under the royal government until the restoration of the Baltimores, in 1715, by George I, as stated in the brief. McSherry, p. 94, *et seq.;* McMahon, p. 34 and p. 237, *et seq.;* Scharf, p. 309, *et seq.*

JOHN HOWARD,

For the Heirs of John Marshall.

RICHMOND, VA., February 21, 1899.